

No. 87-6177-CFH
Status: GRANTED
CAPITAL CASE

Title: Johnny Paul Penry, Petitioner
v.
James A. Lynaugh, Director, Texas Department of
Corrections

Docketed:
January 4, 1988

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Mason, Curtis

Counsel for respondent: Mattox, Jim, Palmer, Charles A.

Entry	Date	Note	Proceedings and Orders
1	Jan 4 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Feb 1 1988		Order extending time to file response to petition until March 4, 1988.
5	Feb 29 1988		Brief of respondent Lynaugh, Director, Texas DOC in opposition filed.
6	Mar 3 1988		DISTRIBUTED. March 18, 1988
7	Jun 17 1988		REDISTRIBUTED. June 23, 1988
9	Jun 24 1988		REDISTRIBUTED. June 29, 1988
10	Jun 24 1988	X	Supplemental brief of petitioner Johnny P. Penry filed.
12	Jun 30 1988		Petition GRANTED. limited to Questions 1 and 2 presented by the petition. *****
13	Jul 19 1988		Joint appendix filed.
16	Jul 23 1988		Order extending time to file brief of petitioner on the merits until September 9, 1988.
17	Aug 1 1988		Record filed.
		*	Certified original record, 2 volumes, received.
18	Aug 1 1988		Record filed.
		*	Certified copy of original record, 8 volumes, received.
22	Sep 8 1988		Brief amicus curiae of Harris County Criminal Lawyers Assn. filed.
19	Sep 9 1988		Brief amicus curiae of Billy Conn Gardner filed.
20	Sep 9 1988		Brief amicus curiae of Texas Criminal Defense Lawyers Assn. filed.
21	Sep 9 1988		Brief amici curiae of American Assn. on Mental Retardation, et al. filed.
24	Sep 9 1988		Brief of petitioner Johnny P. Penry filed.
26	Oct 3 1988		Order extending time to file brief of respondent on the merits until November 12, 1988.
27	Oct 24 1988		SET FOR ARGUMENT. Wednesday, January 11, 1989. (4th case) (1 hr.)
28	Nov 10 1988		Brief of respondent James A. Lynaugh filed.
29	Nov 21 1988		Supplemental brief of respondent filed.
30	Nov 30 1988		Reply brief of petitioner Johnny P. Penry filed.
31	Dec 8 1988		CIRCULATED.
32	Dec 8 1988		CIRCULATED.
33	Jan 11 1989		ARGUED.

87-6177

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,
Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM 1987

CURTIS C. MASON
Attorney for Petitioner
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 295-6371 ext. 1370
Texas Bar No. 13150700

QUESTIONS PRESENTED FOR REVIEW

1. At the punishment phase of a Texas capital murder trial, must the trial court upon a proper request, (a) instruct the jury that they are to take into consideration all evidence that mitigates against the sentence of death and (b) define terms in the three statutory questions in such a way that in answering these questions all mitigating evidence can be taken into consideration?
2. Is it cruel and unusual punishment to execute an individual with the reasoning capacity of a seven year old?
3. Given Penry's degree of mental retardation were his two confessions a voluntary relinquishment of his right to remain silent?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review.	i
Opinions Below.	1
Jurisdiction.	1
Constitutional and Statutory Provisions Involved.	1
Statement of the Case	2
Proceeding and Disposition in the Courts Below	2
Statement of Facts	2
Argument and Authorities.	4
The Texas Capital Punishment Statute as Applied to Penry was a Violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.	4
Execution of a Mentally Retarded Person is Cruel and Unusual Punishment	14
Given Penry's Degree of Mental Retardation his two Confessions were not a Voluntary Relinquishment of his Right to Remain Silent.	17
Summary	20
Certificate of Service.	21
BOUND SEPARATELY	
Appendix A, Opinion of the Fifth Circuit.	A-1
Appendix B, Order Denying First Amended Petition for Writ of Habeas Corpus.	B-1
Appendix C, Order Denying Suggestion for Rehearing En Banc.	C

TABLE OF AUTHORITIES

CASES	PAGE
<u>Blansett v. State</u> , 556 S.W.2d 322 (Tex.Cr.App. 1977).	8
<u>Brogdon v. Butler</u> , 824 F.2d 338 (5th Cir. 1987)	14
<u>Cannon v. State</u> , 691 S.W.2d 664 (Tex.Cr.App. 1985).	5
<u>Clark v. State</u> , 717 S.W.2d 910 (Tex.Cr.App. 1986)	5
<u>Cooper v. Griffin</u> , 455 F.2d 1142 (5th Cir. 1972).	19
<u>Cordova v. State</u> , 733 S.W.2d 175, (Tex.Cr.App. 1987).	5, 8
<u>Drew v. State</u> , __ S.W.2d __, No. 69249 (Tex.Cr.App. Sept. 30, 1987)	10, 11
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982).	5, 8
<u>Ford v. Wainwright</u> , __ U.S. __, 106 S. Ct. 2595 (1986).	14, 15, 16
<u>Franklin v. Lynaugh</u> , 823 F.2d 98.	6, 12, 13

TABLE OF AUTHORITIES CON'T

	PAGE
<u>Gardner v. State</u> , 730 S.W.2d 675 (Tex.Cr.App. 1987)	10
<u>Godfrey v. Georgia</u> , 446 U.S. 420 (1980)	11
<u>Granviel v. Estelle</u> , 655 F.2d 673 (5th Cir. 1981)	8
<u>Granviel v. State</u> , 723 S.W.2d 141 (Tex.Cr.App. 1986).	9
<u>Hitchcock v. Dugger</u> , __ U.S. __, 107 S.Ct. 1821 (1987).	12
<u>Jurek v. Estelle</u> , 623 F.2d 929 (5th Cir. 1980).	18, 19 20
<u>Jurek v. Texas</u> , 428 U.S. 262 (1976)	5, 8, 11
<u>King v. State</u> , 553 S.W.2d 105 (Tex.Cr.App. 1977).	5
<u>Lane v. State</u> , __ S.W.2d __, No. 69,254 (Tex.Cr.App. Dec. 9, 1987). .	10
<u>Penry v. Lynaugh</u> , __ F.2d __, (5th Cir. Nov. 25, 1987)	2
<u>Penry v. State</u> , 691 S.W.2d 636 (Tex. Cr. App. 1985)	2, 5, 6
<u>Ruiz v. Estelle</u> , 679 F.2d 1115 (5th Cir. 1982).	15
<u>Stewart v. State</u> , 686 S.W.2d 118 (Tex.Cr.App. 1984)	5
<u>Thompson v. Oklahoma</u> , __ U.S. __ 107 S.Ct. 1284 (1987).	14
<u>Ex Parte Walker</u> , 13 S.W. 861 (1890)	16
<u>Williams v. State</u> , 674 S.W.2d 315 (TEX.Cr App. 1984).	6
<u>Woodson v. North Carolina</u> , 428 U.S. 280 (1976).	5, 15
 <u>CONSTITUTES AND STATUTES</u>	
Eighth Amendment to the United States Constitution	1
Article 37.071 Texas Code Criminal Procedure.	2, 5
 <u>JOURNAL ARTICLES</u>	
Manual on Terminology and Classification in Mental Retardation. . .	14
Mentally Retarded Criminal Defendant, 53 Geo. Wash. L. Rev. 414 (1985)	16
ABA Standards for Criminal Justice 7-9.3 2d Ed. 1980.	14

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987
JOHNNY PAUL PENRY,
Petitioner
v.
JAMES A. LYNAUGH,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at __F.2d__ (5th Cir. 1987). A copy of the opinion is attached as Appendix A. (p.A-1 to A-21).

The memorandum decision of the United States District Court for the Eastern District of Texas has not been reported. It is attached as Appendix B. (p. B-1 to B-49).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §2254 and 28 U.S.C. §1254, petitioner filed a petition for writ of habeas corpus by a person in state custody in the United States District Court, Eastern District of Texas, Lufkin Division on April 28, 1987. In a memorandum opinion the writ was denied on May 8, 1987 final judgment was entered and certificate of probable cause to appeal to the United States Court of Appeals for the Fifth Circuit was granted. The Fifth Circuit rendered its judgment denying relief on November 25, 1987. Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987. (Appendix C). The Fifth Circuit has decided an important question of federal law which has not been but should be decided by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

and Art. 37.071 Texas Code of Criminal Proc. Ann.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

- (1) whether the conduct of the defendant that cause the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
- (4) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

STATEMENT OF THE CASE

Proceeding and Disposition in the Courts Below:

Penry was tried on a change of venue in the 258th Judicial District Court, Trinity County, Texas. The jury answered all three special issues yes and Penry was sentenced to death on April 18, 1980. His conviction was affirmed, in a published opinion, by the Court of Criminal Appeals of Texas May 1, 1985. Penry v. State, 691 S.W.2d 636 (Tex. Cr. App. 1985). Petition for Writ of Certiorari was denied by the United States Supreme Court on January 13, 1986. U.S., 106 S.Ct. 834 (1986). Writ of Habeas Corpus was denied by the Court of Criminal Appeals of Texas without written opinion on May 5, 1986. A Writ of Habeas Corpus under 28 U.S.C. §2254 was denied by the United States District Court, Eastern District of Texas, Lufkin Division on April 28, 1987 with final judgment entered (ROA 3)¹ and certificate of probable cause granted on May 8, 1987. ROA 1. The United States Court of Appeals for the Fifth Circuit panel decision was rendered November 25, 1987.² Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987.

Statement of Facts

"On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped, and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, ..."

Penry v. Lynaugh, ___ F.2d ___, slip opinion Appendix A p. A-2 (5th cir. Nov. 25, 1987).

1. The number after ROA is the page number of the Record on Appeal filed in Fifth Circuit.
2. Due to his death Judge Hill did not participate in this decision.

Before she died she gave a description of her assailant. Two local sheriff's deputies decided the description was that of Johnny Paul Penry. They picked him up at his father's house took him first to the police station where they were joined by several other law enforcement officers, they all went back to the house where Penry lived and then to the crime scene. At the crime scene Penry made a verbal admission after which he was taken before a magistrate following which a statement was reduced to writing which Penry, a retarded illiterate, signed. The next day another more detailed statement was reduced to writing and signed by Penry. Slip opinion Appendix A p. A-1 to A-2.

At the punishment phase of Penry's trial the following objections were made to the jury instructions;

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term deliberately.

* * *

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."

* * *

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.

* * *

OBJECTION 11: The next objection to the Court's Charge

* * *

is that the Court's Charge fails to instruct the jury to the following effect: "you may taken into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render

improbable that the Defendant can be rehabilitated.

(V.17 R. 2659 - 2664)³

These objections to the charge were overruled.

(V.17 R.2664 1. 20-22).

The mitigating evidence in Penry's case was discussed by the U.S. District Court below as follows;

The evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

Memorandum opinion Appendix B p. B-3 to B-4.

ARGUMENT AND AUTHORITIES

The Texas Capital Punishment Statute as Applied to Penry was a Violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution

In finding that the execution of a mentally retarded person was not cruel and unusual punishment the United States District Court below found that mental retardation was nothing more than one of the mitigating factors to be considered. Appendix B p. B-5 to B-6. In Texas the punishment phase of a capital murder trial consists of the jury answering three narrowly drawn questions;

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of

3. The number after V. is the volume number of the state trial court record. The number after R. is the page number in that volume. The number after 1. is the line number on the page. The state trial court record is an exhibit filed in this cause.

the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(4) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

Art. 37.071 Tex. Code Crim. Proc. Ann.

Any death penalty statute that fails to require that the trier of fact at the punishment phase must consider all mitigating circumstances before assessing the death penalty is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution's prohibition of cruel and unusual punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982), Woodson v. North Carolina, 428 U.S. 280 (1976) In Jurek v. Texas, 428 U.S. 262, 272 (1976) this Court held that although, The Texas Statute does not explicitly speak of mitigating circumstances, that,

By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing functions.

428 U.S. at 276. This Court further observed that at that time,

The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

id. at 272

Almost eleven years has past since Jurek was decided and not only has the Texas Court of Criminal Appeals failed to define the meanings of "criminal acts of violence" and "continuing threat to society" but it has also steadfastly refused to find error when, after timely motion by the defendant, the trial court has failed to instruct the jury on the meaning of these phrases. Penry v. State, 691 S.W.2d at 653-4, Cannon v. State, 691 S.W.2d 664, 667-8 (Tex. Cr. App. 1985), King v. State, 553 S.W.2d 105, 107 (Tex. Cr. App. 1977). In addition the Texas Court of Criminal Appeals has refused to find error, when after a timely motion by the defendant, the trial court has failed to instruct the jury that in answering the questions on the defendant's deliberateness and continuing threat to society they are to take into consideration all mitigating circumstances. Cordova v. State, 733 S.W.2d 175, (Tex. Cr. App. 1987), Clark v. State, 717 S.W.2d 910, 920 (Tex. Cr. App. 1986), Stewart v. State, 686 S.W.2d 118, 126 Clinton dissenting (Tex. Cr. App. 1984).

Penry made a timely request for the following jury instructions:

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term deliberately.

* * *

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."

* * *

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.

* * *

OBJECTION 11: The next objection to the Court's Charge.⁴

* * *

is that the Court's Charge fails to instruct the jury to the following effect: "you may taken into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated.

V.17 R. 2659 - 2664

In accordance with agreement these objections were reduced to writing and signed by Penry's attorneys. (V.17 R. 2664 l. 16-17). These objections to the Charge were overruled, (V.17 R. 2664 l. 20-22), and the Texas Court of Criminal Appeals found no error, holding all the requested terms were to be given their common definitions. Penry v. State, 691 S.W.2d at 653-4. [It should be noted that in Williams v. State, the Texas Court of Criminal Appeals

4. This Court granted certiorari in Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987) Cert. granted 56 U.S.L.W. 3287 (Oct. 9, 1987) on the question of whether a jury instruction like the one in this objection 13 must be given.

admitted that the term "deliberate" has a limited meaning. 674 S.W.2d 315, 322 (Tex. Cr. App. 1984).] The following Charge was then given the jury;

* * *

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the Jury's deliberations.

* * *

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

* * *

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

* * *

SPECIAL ISSUE NO.2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

* * *

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

TR. 117 - 118A⁵

Penry was permitted to argue all the mitigating circumstances to the jury but without any specific instructions from the Court as to where or how

5. The number after TR. is the page number of the state court Transcript included as an exhibit in this cause.

mitigating circumstances are to be applied in deciding the three special issues. Penry could only suggest to the jury that if they did not believe a mentally retarded person should get the death penalty they should pick one or more special issues and vote "no" even if they believed the answer should be yes. That is, Penry could only suggest jury nullification of the law. As the Court of Criminal Appeals tacitly admits in Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Cr. App. 1977), jury nullification is the only way all mitigating circumstances, can be taken into consideration by the Texas death penalty statute. See also Granviel v. Estelle 655 F.2d 673, 676 (5th Cir. 1981). Unless it is assumed Texas jurors will readily violate their oath to follow the law as given by the trial judge, having to depend on jury nullification places an intolerable burden on Penry. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek, 428 U.S. at 271. There is no reason to believe that Texas juries will not do as the judge did in Eddings v. Oklahoma, supra, and follow the law as they understand it by reading the charge and ignore any evidence that does not directly relate to the answering of the three issues given in the jury instructions. This is especially true since this is precisely what the state told the jury they were required to do during its final argument. (V.17 R. 2,688 1. 22-2690 1. 15).

The rationale used by the Texas Court of Criminal Appeals in holding no special instructions on mitigating evidence is required was discussed in Cordova v. State as follows:

Our understanding of both Eddings [455 U.S. 104], supra, and Lockett [438 U.S. 586], supra, is that the Supreme Court did not mandate that a prospective juror must give any amount of weight to any particular fact that might be offered in mitigation of punishment, nor has our research to date revealed where this Court has ever laid down such a requirement. We believe that when properly read, Eddings, supra, and Lockett, supra, merely held that the fact-finder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the special issues. The decisions of the Supreme Court, and of this Court, do not, however, require an affirmative instruction that the fact-finder must give any specified weight to a particular piece of evidence, as appellant's counsel appears to contend. The amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to "the range of judgment and discretion exercised by each juror. See Adams v. Texas, supra, 448 U.S. at 46. Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.

* * *

Although the issue has been presented in many different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme, and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations. As previously pointed out, we find nothing in either Eddings, supra, or Lockett, supra, that would mandate the giving of a general or special instruction on mitigating evidence. E.g., Demouchette v. State, ___ S.W.2d ___ (Tex. Cr. App., No. 69,143, September 24, 1986). Also see Quinones v. State, 592 S.W.2d 933, 947 (Tex. Cr. App. 1980), in which this Court held that no such affirmative instruction was necessary because "The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required."

733 S.W.2d at 189-190.

The above discussion must be considered along with the fact that the jury panel in a capital murder case is still requested to take the following oath:

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

§12.31(b) Texas Penal Code, even though no juror that refuses to take the oath will be disqualified. However, the jurors are not informed of this fact. Granviel v. State, 723 S.W.2d 141, 154-5 (Tex. Cr. App. 1986).

Although Granviel's argument was directed at the giving of the above oath over timely objection, his argument also should be considered in the light of the Texas Court of Criminal Appeal's refusal to instruct the jury on the consideration of mitigating evidence. Granviel's argument against giving the oath is as follows:

Although the State has stopped questioning jurors about the oath required under 12.31(b) and therefore no one is excused for failure to take the oath (because they are not told they can avoid taking the oath), the harm attendant to administering the oath is still present. It does not make much sense to prevent some one from being excused for failure to take the oath because to do so would deprive the accused of a fair and impartial jury but then to allow the trial court to require the jury swear an oath not to let the imposition of the death penalty affect their deliberations. The oath not only violates the spirit of Adams v. Texas, supra, but also violates the tenets of Edmund [sic] v. Florida, supra, [458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140] in that it forces the jury to swear not to consider [sc. allow?] their feelings about the death penalty to affect their deliberations nor does the oath allow the jurors to consider mitigating evidence in determining whether to answer the questions yes or no. By giving the oath, the trial court has forced the jury to consider only the evidence which goes directly to the answering of the questions and to ignore the juror's feelings and arguments against the death penalty.

id. This argument was rejected. id at 155-6.

Further indications that the Texas Court of Criminal Appeals is applying the statutory question of Art. 37.071 in a manner that restricts the consideration of mitigating evidence are found in Gardner v. State, 730 S.W.2d 675 (Tex. Cr. App. 1987) and Drew v. State, ___ S.W.2d ___, No. 69249 (Tex. Cr. App. Sept. 30, 1987). In Gardner a potential juror during voir dire was questioned on whether having found a person had intentionally killed someone she would automatically answer question No. 1, yes. After the potential juror first said she would, the state on cross-voir dire got her to say she would not, after which the trial judge cut off further questioning. 730 S.W.2d at 685 - 688. The Court of Criminal Appeals found;

A venireman who fails to perceive a difference between "intentional" and "deliberate..." will certainly have problems reconsidering guilty stage evidence for its probativeness toward special issues, or for that matter, considering any new evidence presented at the punishment phase with the requisite degree of impartiality.

Judging from its final pronouncement, the trial court was apparently of a mind that it is "entirely impossible" that any reasonable juror would fail to discern a difference between the statutory terms. That is hardly a tenable position in view of the fact that at least four current members of this Court would favor submitted a requested jury instruction which would instruct jurors, inter alia, that "the word 'deliberately' has a meaning different and distinct from the 'intentionally' as that word was previously defined in the charge..."

id. at 689. On December 9, 1987 the Texas Court of Criminal Appeals in Lane v. State ___ S.W.2d ___, ___ n.7, No. 69, 254 (Tex. Cr. App. Dec. 9, 1987) admitted the term deliberate needs to be defined stating,

V.T.C.A., Penal Code Sec. 6.03(a) sets out:

"A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. (emphasis added) It seems appropriate to comment here on how beneficial it would be to this Court in resolving voir dire points of error for the Legislature to accept its responsibility, and define the term "deliberately" as it is set out in Art. 37.071(b)(1)."

In Drew the Texas Court of Criminal Appeals held that a potential juror that would not answer Question No. 2 yes unless the state proved that the future dangerousness involved a danger to human life, could not follow the law stating; "Although the phrase 'criminal acts of violence that would constitute a continuing threat to society' is not defined in the Code of Criminal Procedure, there is nothing in our case law to limit this portion of Article 37.071(b)(2), *supra*, to future murders." Drew slip opinion at 4 - 6.

The voir dire in Gardner and the footnote in Lane illustrates the

difficulty involved in distinguishing intentional and deliberate. In Drew a potential juror who states he would consider it a mitigating factor if the State failed to prove future dangerousness to human life was excused for cause. Both cases illustrate the futility of relying on the statutory question as a vehicle for considering all mitigating evidence. This is particularly true in the light of the fact that Penry's jury, after a timely request, was given no instructions on the application of all mitigating circumstances.

The mitigating evidence in Penry's case was discussed by the U.S. District Court as follows;

This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

Memorandum opinion, Appendix B p. B-3 to B-4. Without instructions on the necessity for considering all mitigating evidence and without proper definitions of terms it is simply impossible for Texas' three statutory questions to encompass all mitigating circumstances. In Jurek v. Texas, this Court upheld the three questions on the assumption that proper definitions would be forthcoming. 428 U.S. at 272. (1976.) None of the terms have been given definitions by the Texas Court of Criminal Appeals and no instructions on consideration of all mitigating evidence is ever given. The Texas Court of Criminal Appeals having defaulted on its promise, the Texas statute should be held a violation of the Eighth Amendment to the United States Constitution as applied. See Godfrey v. Georgia, 446 U.S. 420 (1980.) With jury nullification the only way for all the mitigating evidence to be considered, too great a burden was placed on Penry. By restricting the jury to answering the three statutory questions without any definitions of instructions on

consideration of all mitigating circumstances Penry's jury was just as effectively precluded from consideration of all mitigating evidence as was the Florida jury in Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987).

The Fifth Circuit in their decision questioned whether after Hitchcock the Texas Capital punishment statute was constitutional stating,

It is therefore abundantly clear that a sentencing authority must not be precluded from considering any, or almost any, mitigating evidence. The issue here is what the term "consider" means. The Supreme Court has held that presentation of mitigating circumstances to the sentencing authority is not enough: "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but Lockett requires the sentencer to listen to that evidence." [citation omitted]

Penry v. Lynaugh at A-10

In Texas the punishment phase of a capital murder trial consists of the jury answering three narrowly drawn questions. Art. 37.071 Tex. Code Crim. Proc. Ann.

The Fifth Circuit discussed these questions as follows;

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? McCleskey, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? Brown, 107 S.Ct. at 841 (O'Connor, J., concurring).

We recognize that Jurek specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law.

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room

without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

id at A-11 to A-12.

We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

The state argues that Penry's counsel could, and did, argue the mitigating circumstances to the jury. The defense attorney in Hitchcock also argued to the jury to "consider the whole picture, the whole ball of wax." 107 S.Ct. at 1824. The prosecutor in Hitchcock then stood up and argued to the jury to consider the mitigating circumstances by number. Id. Likewise, here, the prosecutor was able to trump the defense counsel's argument:

I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the state's case because, ladies and gentlemen, I submit to you we've met our burden.

As in Hitchcock, the mere fact that defense counsel argued mitigating circumstances does not conclude the matter. The question is whether the jury could act on the mitigating circumstances and not impose the death penalty. The prosecutor's argument would exclude that consideration.

* * *

We think that a strong argument can be made that developing law, see, e.g., Hitchcock, is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, see Brock v. McCotter, 781 F.2d 1152, 1157 n. 5 (5th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986), we are not free to do so because prior Fifth Circuit decision have rejected claims similar to Penry's. Riles v. McCotter, 799 F.2d 947, 952 - 53 (5th Cir. 1986); Granviel v. Estelle, 655 F.2d 673, 675 - 77 (5th Cir. 1981), cert. denied, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982). The prior panel holdings bar a different holding by us.

id. at A-13 to A-14.

For the above reasons the Texas Capital punishment statute, as applied to Penry should be found to violate the Eighth Amendment as being cruel and unusual punishment.

Execution of a Mentally Retarded Person is Cruel and Unusual Punishment:

The United States Court of Appeals for the Fifth Circuit summarily rejected the argument that execution of a mentally retarded person is cruel and unusual punishment stating, "An identical claim has recently been rejected by this Court. Brogdon v. Butler, 824 F.2d 338 (5th Cir. 1987)." id. at A-3. This Court is presently considering if execution of a person that was 15 years old at the time of the crime is cruel and unusual punishment. Thompson v. Oklahoma, ____ U.S. ____, 107 S.Ct. 1284 (1987). This is a parallel issue.

Mental retardation is not the same type of mental defect as insanity. The two are vastly different mental defects. Mental retardation is defined as:

significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.

GENERAL INTELLECTUAL FUNCTIONING is defined as the results obtained by assessment with one or more of the individually administered general intelligence tests developed for that purpose.

SIGNIFICANTLY SUBAVERAGE is defined as IQ more than two standard deviations below the mean for the test.

ADAPTIVE BEHAVIOR is defined as the effectiveness or degree with which an individual meets the standards or personal independence and social responsibility expected for age and cultural group.

DEVELOPMENTAL PERIOD is defined as the period of time between birth and the 18th birthday.

Manual on Terminology and Classification in Mental Retardation, 1977 Revision, Herbert J. Grossman, M.D., Editor, American Association on Mental Deficiencies, 5101 Wisconsin Ave., N.W., Washington, D.C. 20016, Publisher, p. 11. See also Standard 7-10.1 ABA Standard for Criminal Justice.

Since insanity and mental retardation are two different phenomena, the reasons why execution of an insane person and a mentally retarded person is cruel and unusual, are different. An insane person cannot be executed, because to execute someone that is so out of touch with reality that he is not aware of why he is being executed is cruel and unusual punishment. Ford v. Wainwright, ____ U.S. ____, 106 S.Ct. 2595, (1986). The reason for not executing a mentally retarded person is that he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his mistake. Mental retardation is a factor that mitigates against assessing the maximum punishment of death. Standard 7-9.3 ABA Standard for Criminal Justice.

Accordingly the test for determining if a mentally retarded defendant can be executed should be whether because of mental retardation the defendant has a deficit in adaptive behavior that significantly reduces his ability to learn from mistakes.

In the Brief of Respondent-Appellee filed in the Fifth Circuit on pages C-2 to C-5 is a summary of Penry treatment by the Texas Mental Health/Mental Retardation (MHMR) system and penal system. When Penry was 9 years old MHMR became aware that Penry was mentally retarded, had been subjected to child abuse and had violent and aggressive tendencies. This initial contact was followed by five more essential identical diagnoses and treatment at three different MHMR facilities. Penry then spent 2 years incarcerated in the Texas Department of Corrections after which he was once again diagnosed by MHMR which recommended treatment at a halfway house. The diagnosis concluded that Penry was mentally retarded with antisocial tendencies. Starting when Penry was 9 years old and continuing for 12 years MHMR knew they were dealing with a mentally retarded child that had been subjected to child abuse and who had aggressive tendencies. In his early twenties this short, thin, (V.13 R. 1525 l. 20-22) person with the mental ability of a 6 or 7 year old spent two years in a prison system where, " ... inmates are routinely subjected to brutality, extortion, and rape by their cellmates." Ruiz v. Estelle, 679 F.2d 1115, 1141 (5th Cir. 1982). Penry is now on death row convicted of raping and murdering a woman. There can hardly be a more classic example of the failure of the Texas MHMR and prison system.

The Eighth Amendment to the U.S. Constitution assures that the State's power to punish is exercised within the limits of civilized society and central to any determination of whether punishment is cruel and unusual is the use of contemporary standards. Ford v. Wainwright, ____ U.S. ____, 106 S.Ct. 2595, 2600 (1986), Woodson v. North Carolina, 428 U.S. 280, 288 (1976). The U.S. District Court found that Penry's I.Q. was between 50 and 63, meaning he has the mind of a six or seven year old child and the social maturity of an eight and ten year old child. Memorandum opinion, Appendix B p. B-3 to B-4. This finding is adequately supported by the trial court record.

Contemporary standards can be determined by legislative enactments, court opinions, public opinion surveys and the position taken by recognized professional organizations. For at least the last 100 years Texas by statute

has prohibited the execution of a person that was under 17 years of age at the time of the offense. Tex. Penal Code Ann. § 8.07(d), Ex parte Walker, 13 S.W. 861 (1890). This Court in Ford v. Wainwright, _____ U.S. _____, 106 S.Ct. 2595 (1986) held the Eighth Amendment prohibits the execution of the insane. In so doing this Court used as its starting point the common law principal that, "[I]diots and lunatics are not chargeable for their own acts, ..." id at 2600. Under the common law,

[An idiot is] a person who cannot account or number twenty pence, nor can tell who is his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.

Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 416 (1985).

A recent survey commissioned by Amnesty International found that in Florida 71% were against a mental retarded defendant being put to death while only 12% were in favor. ROA between pages 63 and 64. A study by Center for Public and Urban Research, Georgia State University obtained similar results. (See Rule 28 (J) Authority filed in the Fifth Circuit) January 10-12, 1986 at the Council Meeting of the American Association of Mental Deficiencies (AAMD) the Council unanimously endorsed the following resolution,

The imposition of capital punishment on individuals with mental retardation raises troubling legal and moral issues. The AAMD supports legal reforms in the States that comport with the standard of civilized Common Law nations.

Mental Retardation, Vol. 24 No. 1 P.47 (ROA 126.)

Following the execution of Jerome Bowden in Georgia on June 24, 1986 the AAMD issued a press release condemning the execution. (ROA 128a). It should be noted that the AAMD is a professional association that has nearly 10,000 members.

The U.S. District Court, in denying relief on the cruel and unusual punishment ground, found that for Penry to be entitled to relief he would have to be so retarded that he was not competent to stand trial. Memorandum opinion at B-6 to B-7. This finding is not supported by the common law which held that the test was whether or not the person could learn by his mistakes. It is not supported by contemporary standards either. Accordingly to execute a person with Penry's degree of mental retardation would be cruel and unusual punishment.

Given Penry's Degree of Mental Retardation his two Confessions Were Not a Voluntary Relinquishment of his Right to Remain Silent.

Penry was the subject of a psychiatric examination performed by Jose G. Garcia, M.D., on February 25, 1980. Among other things Dr. Garcia concluded Petitioner, " ... is a person who can be made to say anything that he is asked under any slight pressure and can be so easily led." TR. 91. At the competency hearing, evidence of Penry's susceptibility to suggestions was presented. David Finch, who had known Penry since 1973 (V.6 R. 416 l. 22-23) testified Penry was very gullible (V.6 R. 421 l. 7-8) and:

"He can be led in anything. Just like signing a confession. If somebody said, here, sign this or do this, he'd do it. If he felt you were superior, and had authority over him, he'd do it."

(V. 6 R. 435 l. 13-17).

Jerome E. Brown, Ph.D., a clinical psychologist testified that in 1973 Penry had been diagnosed as, "... subject to influence and manipulation by people more intelligent and sophisticated than he was." (V.6 R. 563 l. 1-3). There was documentation of a history of "... abuse and history of being taken advantage of, ..." (V.6 R. 564 l. 8- 9), and "They could coerce him into saying that he did things when he didn't do them." (V.6 R. 566 l. 9-10). "Ideas can be put into his head. Ideas can be taken away." (V6. R. 580 l. 6-7). "He'll tell you whatever story that he thinks is the right thing to say at that moment." (V.6 R. 620 l. 19-21).

Penry's confession taken by Ranger Cook (ROA 181 - 183) was the product of a mentally retarded person's desire to tell Ranger Cook, a person in authority, what Ranger Cook wanted to hear rather than an accurate confession.

The accuracy of the confession taken by Ranger Cook on 10-26-79 is questionable for the following reasons: (1) The victim of the attempted rape discussed in the last paragraph on ROA 181 did not identify Penry as the one that attempted to rape her. V. 17 R. 2617 l. 9-23; (2) In the first full paragraph on ROA 182 Penry confessed to raping another woman, threatened to kill her if she told the police and then a few weeks later he returned, beat her up and tried to kill her because she told the police, yet the rape was not reported to any of the law enforcement officials of Polk County. Respondent's Answers to Interrogatories No. 1(A) ROA 85-6. This portion of the confession reads like a six year old telling a "whopper." (3) The rape described in the second full paragraph of page 2 is inaccurate in that rather than turning

himself over to "2 guys who came by" the victim told two men who gave them a ride that she had been raped and the two men held Penry at gun point until two officers arrived. State's Answers to Interrogatories No. 2 ROA 86-7. In describing how he raped and killed the victim in the present offense Penry stated that the victim knocked a still open knife out of his hand. (Middle of ROA 183) The officer investigating the crime scene stated the knife on the floor at the scene was closed when found. V.4 R. 255 l. 15-20. If the rest of the rape and murder happened as described in the confession it is clear that Petitioner could not have picked up the knife, closed it and dropped it again.

Prior to Chief of Police William Smith taking Penry's statement, Petitioner had been read a "Miranda Warning" several times and had been taken before a magistrate where he was told he was charged with capital murder and given a standard "Magistrate's warning." V. 4 R. 204 l. 1-22. After which the magistrate asked Penry if he understood, Penry said he did, and the warning form was then handed to Penry to sign. V. 4 R. 205 l. 2-6. Penry's father spoke up to stop the signing, stating Penry could not read, his father then read the rights to Penry, asked him if he did it and after receiving an affirmative answer, told Penry "well you belong in jail, I'm gone." and Penry's father left. V. 4 R. 205 l. 3-207 l. 6. No detailed explanation of the warning was given Penry by the magistrate. V. 4 R. 212 l. 14-20.

After Penry was given the magistrate's warning Chief Smith and District Attorney Price read another warning to Penry from a form used to take statements. V. 4 R. 186 l. 4 - R. 188 l. 19. Penry stated he understood the warning. V. 4 R. 189 l. 2-12. The taking of Penry's statement started at 3:25 p.m. and ended at 6:05 p.m. V. 4 R. 193 l. 2-9. Neither the magistrate nor Chief Smith explained to Penry the seriousness of the charge "capital murder" or make any detail inquiry as to the extent Penry understood his constitutional rights. Chief Smith did testify at the trial on the merits that there was some explanation of Penry's rights. V. 14 R. 1831 l. 2 - R. 1833 l. 3.

The statement taken by Chief Smith was first taken in handwritten version which was then given to his secretary Alice Tieman to type. V. 14 R. 1836 l. 15 - R. 1837 l. 8. Alice Tieman was not present during the taking of the statement. V. 14 R. 1836 l. 19-21.

In Jurek v. Estelle, the Fifth Circuit stated,

In considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.

623 F.2d 929, 937 (5th Cir. 1980).

* * *

The concern in a case involving a defendant of subnormal intelligence is one of suggestibility. [Citations omitted] Doubtless, if the prosecutors pursue a specific object in the interrogation of such an accused, and the resulting confession bears the precise fruit of their aims, it will be doubly suspect.

* * *

We must view incredulously, however, any suggestion that the second confession came directly from the accused. It is noteworthy that the second was taken in longhand by a prosecutor and then typed.

The panel majority was doubtless correct in its statement that prosecution-composed confessions are highly suspect, particularly where the accused is of below normal intelligence, [Citations omitted]

id. at 938.

We must be alert, as the panel majority stated, to the "manifest attitude" of the police toward the defendant. [Citations omitted] The Supreme Court has mandated "the most careful scrutiny" where the primary aim of prosecutors was "securing a statement from defendant on which they could convict [the defendant]" as opposed to solving the crime.

id. at 939.

In Cooper v. Griffin, the Fifth Circuit stated,

The requirement of "knowing and intelligent" waiver implies a rational choice based upon some appreciation of the consequences of the decision. See Molignaro v. Smith, 5 Cir., 1969, 408 F.2d 795. Here the boys surely had no appreciation of the options before them or of the consequences of their choice. Indeed it is doubtful that they even comprehended all of the words that were read to them. Thus, they could not have made a "knowing and intelligent" waiver of their rights.

455 F.2d 1142, 1146 (5th Cir. 1972).

In Jurek the defendant was mildly retarded with possible organic brain damage. *supra* at 936. In Cooper the defendant had I.Q. in the 60 to 68 range. Mr. Penry is moderately to mildly retarded with possible organic brain damage with I.Q. of 50 to 60. Accordingly Penry is more severely retarded than the defendants in either Jurek or Cooper.

District Attorney Price stated that the reason Penry was given so many Miranda warning was that they wanted to be sure they got a statement that would hold up in court. V. 7 R. 830 l. 19 - R. 831 l. 7. Penry's susceptibility to pressure was discussed in the previous section. Nothing in

the record indicates that capital murder was ever explained to him in terms he could understand or that he was cautioned that signing the statement prepared by Chief Smith could be used to give him the death penalty. Chief Smith prepared Penry's statement in long hand and then had his secretary type it. This statement, accordingly, is highly suspect and was not the product of Penry's own free will, following a knowing and intelligent waiver based on a rational choice by Penry who at the time had little awareness of the consequences of signing the statement. The statement taken by Chief Smith should have been suppressed.

The argument and authority as to why the statement taken by Chief Smith should have been suppressed also applies to the statement taken by Ranger Cook with the exception that Ranger Cook typed the statement himself. However, Ranger Cook admitted he did not use Penry's exact words in the statement. V. 4 R. 227 1. 17-21. District Attorney Price was also present when Ranger Cook took the second statement. This statement was taken at District Attorney Price's suggestion because there was some additional information that was available then that was not available when Chief Smith took the first statement. V. 4 R. 234 1. 13-20. Ranger Cook spent 6 or 7 hours with Penry on the day he took the statement. V 15 R. 2014 1. 17-20. The additional information added at District Attorney Price's suggestion increased the probability that Penry would receive the death penalty rather than life in prison in that this additional information made Penry's actions appear more deliberate and he would appear more likely to continue committing acts of violence. In Jurek, the second statement was obtained for prosecutorial purposes in their drive for the death penalty. *supra* at 940. So too in Penry's case the second statement was taken for the purpose of obtaining the death penalty. This second statement should have been suppressed.

SUMMARY

For the above reasons this Petition for Writ of Certiorari should be granted and the Texas capital punishment statute as applied to Penry should be declared unconstitutional.

In the alternative the execution of a person with Penry's degree of mental retardation should be declared cruel and unusual punishment.

Penry's two confessions should have been suppressed.

Respectfully submitted,

BY: C. C. Mason
Curtis C. Mason
Attorney for
Petitioner-Appellant
Staff Counsel for Inmates
P.O. Box 99
Huntsville, TX 77342-0099
409-294-2370
Bar No. 13150700

CERTIFICATE OF SERVICE

I, Curtis C. Mason, Attorney for Petitioner-Appellant, do hereby certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari, has been forwarded by United States Mail, postage prepaid, first class, to the Attorney General of Texas, P. O. Box 12548, Austin, Texas 78711, on this the 30th day of December, 1987.

C. C. Mason
Curtis C. Mason
Attorney for
Petitioner-Appellant

FEB 29 1988

JOSEPH F. SPANOL JR.
CLERK

ORIGINAL

NO. 87-6177

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

MARY F. KELLER
First Assistant
Attorney General

CHARLES A. PALMER*
Assistant Attorney General

LOU MCCREARY
Executive Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

QUESTIONS PRESENTED

- I. Whether the Texas capital-sentencing statute is unconstitutional for failing to require specific instruction regarding balancing of aggravating and mitigating circumstances and for failing to define some of the terms used in the special issues on punishment.
- II. Whether the execution of a death sentenced inmate who has limited mental capacity but who was adjudged competent at trial violates the eighth amendment proscription against cruel and unusual punishment.
- III. Whether Penry's confessions were voluntarily given and whether he knowingly relinquished his right against self-incrimination.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . .	2
STATEMENT OF THE CASE	2
A. <u>Course of Proceedings and</u> <u>Disposition Below</u>	2
B. <u>Statement of Facts</u>	3
SUMMARY OF ARGUMENT	8
REASONS FOR DENYING THE WRIT	8
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	8
II. THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SEN- TENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.	9
III. EXECUTION OF A MENTALLY RETARDED PERSON DOES NOT CONSTITUTE AN EIGHTH AMENDMENT VIOLATION.	13
IV. PENRY'S CLAIM THAT HIS CONFESSIONS WERE INVOLUNTARY BECAUSE HE DID NOT KNOWINGLY RELINQUISH HIS RIGHT TO REMAIN SILENT IS MERITLESS IN LIGHT OF THE FACTUAL FINDINGS OF THE STATE COURTS.	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Barclay v. Florida, 463 U.S. 939 (1983)	12
Colorado v. Spring, ___ U.S. ___, 107 S.Ct. 851 (1987)	18
Cordova v. State, 733 S.W.2d 175 (Tex.Crim.App. 1987)	12
Cupp v. Naughten, 414 U.S. 141 (1973)	13
Eddings v. Oklahoma, 455 U.S. 104 (1982).	11,12
Enmund v. Florida, 458 U.S. 782 (1982).	12
Ford v. Wainwright, ___ U.S. ___, 106 S.Ct. 2595 (1986).	13,14,15
Gardner v. Florida, 430 U.S. 349 (1977)	12
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) . . .	15
Gregg v. Georgia, 428 U.S. 153 (1976)	9
Johnson v. Cabana, 818 F.2d 333 (5th Cir.), <u>cert.</u> <u>denied</u> , ___ U.S. ___, 107 S.Ct. 2207 (1987). . . .	15
Johnson v. State, 691 S.W.2d 619 (Tex.Crim.App. 1984)	11
Jurek v. State, 522 S.W.2d 934 (Tex.Crim.App. 1975)	11
Jurek v. Texas, 428 U.S. 262 (1976)	10,11
Lockett v. Ohio, 438 U.S. 586 (1978).	9,12
Maggio v. Fulford, 462 U.S. 111 (1983).	14
Miller v. Fenton, ___ U.S. ___, 106 S.Ct. 445 (1986)	16
Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), <u>cert. denied</u> , ___ U.S. ___, 105 S.Ct. 2040 (1985)	13
Miranda v. Arizona, 384 U.S. 436 (1966)	passim
Moran v. Burbine, ___ U.S. ___, 106 S.Ct. 1135 (1986).	16,17
North Carolina v. Butler, 441 U.S. 370 (1979)	18
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976)	9
Stewart v. State, 686 S.W.2d 118 (Tex.Crim.App. 1984)	11
Tacon v. Arizona, 410 U.S. 351 (1973)	15
Woodson v. North Carolina, 428 U.S. 280 (1976). . . .	9
Zant v. Stevens, 462 U.S. 862 (1983).	12

TABLE OF AUTHORITIES. CONTINUED

Constitutions, Statutes and Rules	Page
U. S. Const., amend. V	2,18
U. S. Const., amend. VIII	2,13
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254(d)	14,16
Sup. Ct. R. 17.	8
Tex. Code Crim. Proc. Ann. art. 11.07 §2 (Vernon Supp. 1984).	3
Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).	2,3,10
Tex. Code Crim. Proc. Ann. art. 46.02 §1(a) (Vernon 1981).	14
Tex. Penal Code Ann. art. 8.01 (Vernon 1974).	14
Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1988). . . .	10

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

JOHNNY PAUL PENRY,
Petitioner,
v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent¹ herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the district court's denial of habeas relief is attached to the petition as Appendix A. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). The unpublished opinion of the district court is attached to the petition as Appendix B. Penry v. Lynaugh No. L-86-89-CA (E.D. Tex. 1987).

¹For clarity, Respondent is referred to as "the state," and Petitioner as "Penry."

JURISDICTION

Penry seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Penry relies on the fifth and eighth amendments to the Constitution. Also at issue here is the Texas statute which sets out the special issues at the punishment phase of a capital trial. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful custody of Penry pursuant to a judgment and sentence of the 258th Judicial District Court of Trinity County, Texas, in Cause No. 6572, styled The State of Texas v. Johnny Paul Penry. On November 7, 1979, Penry was indicted for the offense of capital murder of Pamela Carpenter while in the course of committing and attempting to commit the offense of aggravated rape, to which he entered a plea of not guilty (SF XIII 1344).²

Penry's pretrial motions were heard on January 11, 1980 (SF III 28-83), including a motion for change of venue which was granted on that date (SF III 84-101). His pretrial motions were continued on February 29, 1980, and a hearing was held on his motions to suppress his confessions (SF IV). Detailed findings of fact and conclusions of law denying the motion to suppress were filed on March 25, 1980 (Tr. 94). An extensive hearing on Penry's challenge to his competency to stand trial was held before a jury on March 10-13, 1980 (SF V-VII), and the jury found him competent (SF VII 944-45).

²"Tr." refers to the transcript of Penry's state court proceedings located in Volume I. "SF" refers to the statement of facts, with reference made to the volume number typewritten on the bottom of the cover of each volume and page number as reflected in the lower right hand corner of each page. The appendices attached to Penry's petition are referred to as "A" and "B" with the appropriate page numbers following.

Trial began on March 24, 1980, and on April 1, 1980, the jury found Penry guilty of the capital offense (Tr. 111; SF 2533). On April 1, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1987) (Tr. 118-119; SF XVII 2698-2703).

Penry appealed this conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed on January 9, 1985. Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985) (en banc). Rehearing was denied on May 2, 1985. Certiorari was denied on January 13, 1986. Penry v. Texas, ___ U.S. ___, 106 S.Ct. 834 (1986).

Penry was formally sentenced to be executed before sunrise on May 7, 1986. he filed an application pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 §2 (Vernon Supp. 1984) on April 10, 1986. The state convicting court recommended denial on April 25, 1986. The Texas Court of Criminal Appeals denied the application and motion for stay of execution on May 5, 1986. Ex parte Penry, Application No. 15918-01.

On May 5, 1986, Penry filed an application for writ of habeas corpus and a motion for stay of execution in the United States District Court for the Eastern District of Texas Lufkin Division. Penry v. McCotter, No. L-86-89-CA. United States District Judge William M. Steger entered a stay of execution on May 6, 1986. An order denying all habeas relief was entered on April 28, 1987, and the stay of execution was vacated. The district court granted Penry's request for certificate of probable cause to appeal, and on November 25, 1987, the Court of Appeals for the Fifth Circuit affirmed. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). Rehearing and rehearing en banc were denied on December 23, 1987.

B. Statement of Facts

Johnny Paul Penry was hired by Harold Stubblefield to deliver a freezer to the home of the deceased, Pamela Carpenter. Penry assisted with the delivery on October 9, 1979 (SF XIII

1351-65, 1377).

On October 25, 1979, between 9:00-9:30 a.m., the deceased spoke with her mother, Mrs. Rossie Moseley (SF XIII 1384). At about 10:00 a.m. she phoned a friend, Cindy Peters, and stated "This is Pam. I've been stabbed and raped. Mother's at the church. Help me and hurry." (SF XIII 1391-92, 1397-99, 1407). Peters went immediately to the deceased's residence and observed the deceased on her bed, covered with blood and moaning for help (SF XIII 1393, 1399-403). An ambulance was immediately called (SF XIII 1428-30).

Officer E. G. Page of the Livingston Police Department arrived on the scene at 10:26 a.m. (SF IV 255; XIII 1441), and spoke to the deceased (SF IV 253-54; XIII 1443), who told him her attacker was a white male, about twenty years old, short, thin with short, dark curly hair, and was wearing a plaid shirt, "possible flowers" and blue jeans (SF XIII 1446, 1449-50). The emergency technicians arrived soon thereafter to discover the deceased in a state of shock and bleeding (SF XIII 1481-85, XIV 1822).

The deceased received extensive emergency treatment in the hospital (SF XIII 1502-18). During the first hour, she was conscious and talking (SF XIII 1513-15, 1558). She stated that she had been stabbed with scissors and raped by a white male, short, thin with black hair. She stated that she had seen him before but did not know his name³ (SF XIII 1524-26, 1558). The deceased's condition deteriorated and she died around noon during the emergency treatment. The cause of death was massive hemorrhage and the chest injury (SF XV 2081), which was consistent with having been stabbed with a pair of scissors (SF XIII 1519-20, 1563; XV 2077-79, 2094). The deceased also had a large bruise on her left side of her eye consistent with having been

³Her description given to Dr. McLendon was not admitted before the jury (SF XIII 1533).

struck by a fist, multiple bruises on her legs, a bruise on her throat consistent with hand strangulation, a bruise on the left rib cage about the size of a man's shoe heel, and a defensive wound on her hand (SF XIII 1506, 1557; XV 2063-81). Semen was observed on the genital area during the emergency treatment (SF XIII 1563-64); however, the deceased had extensive urinary tract hemorrhaging and no semen was found during the autopsy (SF XV 2082).

Deputy Sheriffs Billy Ray Nelson and Bob Grissom received a description of the assailant over the patrol car radio at approximately 11:00 a.m. (SF IV 136-37, 159-62, 173; XIV 1568-69, 1639-40). Nelson was familiar with Penry, who fit the dispatched description and had recently been released from the Texas Department of Corrections for rape (SF IV 138; XIV 1569). They proceeded to Penry's father's home, spoke with Penry and inquired of his whereabouts. Penry responded that he had been home about an hour (SF XIV 1570, 1639, 1641). The officers informed him that a girl had been possibly cut or stabbed and raped (SF IV 139-40; XIV 1572). Penry denied any knowledge (SF XIV 1570-72), but he agreed to accompany the officers to the police station⁴ (SF IV 140; XIV 1573-75, 1594-95, 1643, 1656-57). No questions were asked on the way to the station (SF XIV 1586).

Within moments after their arrival, Ted Everitt, an investigator for the district attorney's office, advised Penry of his Miranda⁵ rights off the standard police-issued card (SF IV 142, 145-47; XIV 1579, 1589, 1669-75). Penry did not request a lawyer (SF XIV 1589). At this time Officer Grissom noticed blood on the upper back shoulder of Penry's shirt and asked him about it. Penry responded that he had fallen on a stick while riding his bicycle earlier that morning. Because there was no tear in the

⁴During the time at the Penry house, the officers never saw Penry's back (SF XIV 1572-76).

⁵Miranda v. Arizona, 384 U.S. 436 (1966).

shirt he was wearing, the officers asked him to show them the shirt he was wearing when the accident occurred. Penry responded that he'd be glad to and informed them the shirt was at his house (SF IV 142-44; XIV 1579-81, 1645-46, 1676-77). Miranda rights were again read in connection with Penry's signing a consent to search form at 12:10 p.m. (SF IV 144-47; XIV 1581-83, 1601-03, 1646, 1677-86; XVIII St.Ex. 7; XX St.Ex. 18).

The officers and Penry returned to the house and retrieved the shirt (SF IV 148-49; XIV 1604, 1646, 1686-88). Penry was then asked if he would accompany them to the crime scene and he agreed (SF IV 150; XIV 1604-05, 1648, 1689-90). Penry said, "I'll go with you, just don't try to pin anything on me I didn't do" (SF XIV 1648, 1690). The officer responded he wouldn't do that. At the deceased's house, Penry remained in the car unrestrained. After about thirty to forty minutes, Penry initiated a conversation by stating, "I want to tell you about it" (SF IV 151-52; XIV 1608-10, 1618). Officer Nelson testified, "I told him to just to be quiet. I didn't want to hear it. I told him to just shut up." Penry responded, "No, I want to get it off my conscience. I done it, and I want to get it off my conscience" (SF IV 151-52, 154; XIV 1618). Penry was placed under arrest (SF XIV 1625) and Officer Grissom then re-read Penry his Miranda rights (SF IV 153-54; XIV 1619-20, 1651-53). Penry then reiterated his desire to tell the truth (SF IV 154). Penry was taken into the house, where he described the crime, pointed out the scissors used to stab the deceased, and identified his pocket-knife⁶ (SF IV 154-55, 181-82; XIV 1620, 1723-24). He was subsequently searched, returned to the station (SF IV 181-82; XIV 1622, 1717-18), and turned over to Chief William F. Smith (SF XIV 1719).

⁶The officer's description of Penry's actions at the crime scene was not admitted before the jury (SF XIV 1742).

A formal complaint was filed and an arrest warrant obtained (SF IV 252). Penry was taken before Judge Galloway for administration of magistrate's warnings on a charge of capital murder and they were twice read (SF IV 183, 203-12; XIV 1787-88, 1802-09, 1813-18). At the initial reading, Penry's father and step-mother appeared in court and "hollered not to sign it or make any statements" (SF IV 205). Penry's father read the magistrate's warnings to his son (SF IV 184; VI 537; XIV 1788-90, 1806, 1844) and when told he was charged with capital murder, Penry asked, "Did she die?" (SF IV 205; XIV 1815). Mr. Penry quit reading to his son and asked his son if he had committed the crime. Penry responded that he had. Mr. Penry, Sr., "stormed out of the office, out of the courtroom and told him he was through with him. He could go to jail as far as he was concerned" (SF IV 184-85; 205-07; XIV 1845). Penry subsequently signed the magistrate's warning in Judge Galloway's presence (SF IV 207).

Miranda warnings were again read and individually explained to Penry by Chief Smith at about 3:25 p.m. (SF IV 185-89, 200-01; XIV 1709, 1828-32, 1846-49; XV 1889-90). Penry then gave a confession which was reduced to writing (SF IV 185-89; XIV 1833-34, 1850). Smith knew that Penry could not read or write. The statement was read to him twice in its entirety including the warnings, with witnessing and signing by Penry occurring after the second reading at 6:05 p.m. on October 25, 1979 (SF IV 189-93, 214-15; XIV 1835-36, 1850-53, XV 1872-93, 1979).⁷

On October 26, 1979, Penry agreed to give hair samples, was again administered Miranda warnings, and signed a consent to search form (SF IV 195-96). On that date, Texas Ranger Maurice Cook again read and explained to Penry his Miranda warnings (SF IV 223-25; XV 1865, 1874-77, 1988-91). Penry gave a second

⁷This statement as it was presented to the jury appears in Vol. XV 1895-1902.

verbal confession, which was reduced to writing and read to him in its entirety, including the warnings. An addition was made by Penry and the statement was witnessed and signed (SF IV 227-32, 240-44; XV 1866, 1877-78, 1992-99, 2043-47, 2050-53).⁸

SUMMARY OF ARGUMENT

There are no special or important reasons to consider the questions presented.

The Texas capital-sentencing statute is constitutional. Because the special issues submitted to the jury on punishment are narrowly drawn so as to focus the jury's attention, and the defendant is allowed to present all relevant mitigating evidence for the jury's consideration in answering the special issues, there is no need for specific instructions on mitigating evidence.

Execution of a mentally retarded person does not violate the Constitution. Penry's low I.Q. notwithstanding, there is no question that he knows that he is to be executed and the reason why. No decision of this Court precludes the execution of a person of Penry's mental status.

There is no merit to Penry's challenge to the voluntariness of his confessions. Given the factual findings of the state courts, which were accepted by the federal habeas course, this claim must fail.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are

⁸This second statement appears in evidence at the guilt phase with reference to extraneous offenses removed (SF XV 1999, 2022-31).

special and important reasons therefor. Penry has advanced no special or important reason in this case, and none exists.

II.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Penry contends that the special issues a jury must answer in deciding punishment in a capital case are so narrowly drawn that, absent a specific instruction on how to consider mitigating evidence, the jury can be prevented from considering relevant mitigating evidence and from engaging in the type of individualized sentencing mandated by the Constitution. Because the trial court in his case gave no such instruction, he argues that the jury could have excluded relevant mitigating evidence from its punishment deliberations so that his resulting death sentence was unconstitutionally imposed.

A capital-sentencing statute must meet two requirements to pass constitutional scrutiny. First, the statute must be structured so that the death penalty is not imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 189 (1976). It must provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Second, a capital-sentencing statute must provide for individualized sentencing by allowing the defendant to present evidence in mitigation of a sentence of death. Mandatory capital punishment statutes have been struck down because of their "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 (1976); and sentences under guided-discretion statutes have been vacated when the sentencer was prevented from considering aspects of the defendant's character or record or the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586 (1978).

The Texas statute was found to satisfy both requirements in Jurek v. Texas, 428 U.S. 262 (1976). First, the offenses for which the state may seek to impose the death penalty are limited to intentional murders committed under strictly defined circumstances. Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1988). Once a defendant is found guilty of capital murder, a separate sentencing hearing is conducted to determine whether the punishment will be life imprisonment or death. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1987). Finally, all convictions that result in a sentence of death are automatically reviewed by the Texas Court of Criminal Appeals. Id., art. 37.071(f). The Texas statute was thus structured so as to prevent the sentencing authority from imposing a sentence of death in an arbitrary and unpredictable fashion. Jurek, 428 U.S. at 276. Penry does not challenge the validity of this aspect of the statute.

This Court also found that the Texas procedure provides for individualized sentencing. In Texas, after finding a defendant guilty of capital murder, the jury is not directly asked whether the punishment should be life imprisonment or death. Rather, the following set of special issues is submitted:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b). The jury must be persuaded beyond a reasonable doubt before a question may be answered affirmatively. If all of the issues submitted are answered "yes," the court sentences the defendant to death; otherwise, the sentence is life imprisonment.

In Jurek the Court noted that the special issues do not explicitly speak of mitigating circumstances. However, the Texas

Court of Criminal Appeals had interpreted the second question so as to allow the defendant to present to the jury whatever mitigating evidence he might wish:

'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look at the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.'

Jurek, 428 U.S. at 272, quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975). The Texas statute puts before the jury "all possible relevant information about the individual defendant whose fate it must decide." Jurek, 428 U.S. at 276. In thus providing for individualized sentencing, Texas' procedure meets the requirements imposed by the Constitution.

Penry argues that the structure of the special issues might convince jurors that they are unable to consider certain evidence. He relies on certain statements in the opinion of the court below similar to those expressed by three dissenting members of the Texas Court of Criminal Appeals. In Stewart v. State, 686 S.W.2d 118, 125-26 (Tex.Crim.App. 1984), Judge Clinton, joined by Judges Teague and Miller, noted that evidence of mental illness and childhood deprivation could be introduced by the defendant as mitigating circumstances, but could also be viewed as weighing in favor of a death sentence. The dissent opined that the jury ought to be instructed by the trial court that the evidence had to be considered as mitigating. See also Johnson v. State, 691 S.W.2d 619, 627 (Tex.Crim.App. 1984) (Clinton, J., dissenting).

The minority members of the Court of Criminal Appeals themselves recognized, however, what this Court stated in Eddings v. Oklahoma, 455 U.S. 104 (1982): that evidence of difficult family history and of emotional disturbance is frequently

introduced by defendants in mitigation, and juries can easily grasp its significance. Eddings, 455 U.S. at 115. Although the sentencing authority cannot refuse to or be precluded from considering certain evidence as mitigating, nothing in the Constitution requires that it be considered only as mitigating. This much is evident from the Court's recognition in Enmund v. Florida, 458 U.S. 782 (1982), that, while a vicarious felony murderer may be executed in some states absent an intent to kill if sufficient aggravating factors are present, some of those same states make it a mitigating factor that the defendant was an accomplice to the murder and his own participation was relatively minor. Enmund, 458 U.S. at 791-92. It also follows from the requirement that the defendant be allowed to explain any evidence the state introduces in favor of the death sentence. Gardner v. Florida, 430 U.S. 349, 362 (1977). Like any circumstantial evidence, that introduced at the punishment phase of a capital murder trial can be susceptible of more than one interpretation. It is for the jury to determine the weight such evidence receives. See Eddings, 455 U.S. at 114-15 ("[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence"); Barclay v. Florida, 463 U.S. 939, 961 n. 2 (1983) (Stevens, J., concurring) (neither Lockett nor Eddings held that any particular weight must be given by the sentencer to mitigating evidence); Zant v. Stevens, 462 U.S. 862, 891 (1983) (Constitution does not require states to adopt specific standards for instructing jury how to consider aggravating and mitigating circumstances).

The Constitution requires the sentencer to listen to the defendant's mitigating evidence but does not usurp the sentencer's role in assessing the value of that evidence. Similarly, the Texas statute allows the defendant to submit to the jury whatever mitigating evidence he chooses to and requires the jury to consider that evidence in deciding punishment, but leaves to the jury the determination of what weight to give to it. See Cordova v. State, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (in

Texas, mitigating evidence is given effect by the influence it has on the jury during deliberations).

Penry also argues that the state convicting court erred in failing to define certain terms used in the special issues on punishment. The Fifth Circuit has consistently recognized that these words "are sufficiently common that their definition is not required in a jury charge under the capital murder statute." Milton v. Procunier, 744 F.2d 1091, 1095 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2040 (1985). The court's jury instructions on the punishment issues were not objectionable under Texas law or as a matter of federal constitutional law. Certainly, the instructions were not so defective as to render the punishment hearing as a whole fundamentally unfair. Cupp v. Naughten, 414 U.S. 141 (1973).

III.

EXECUTION OF A MENTALLY RETARDED PERSON DOES NOT CONSTITUTE AN EIGHTH AMENDMENT VIOLATION.

Penry contends that his execution would violate the eighth amendment proscription against cruel and unusual punishment because he is mentally retarded. In support of his claim, he argues that the Court's decision in Ford v. Wainwright, ___ U.S. ___, 106 S.Ct. 2595 (1986), precludes the execution of "idiots and lunatics." He asserts that execution of such persons offends contemporary notions of decency, citing to the American Association of Mental Deficiencies standards, a Florida survey and Texas' prohibition against the execution of persons who are under the chronological age of 17 when they commit the offense.

The evidence that Penry has limited mental capacity is not in dispute. As the district court found, psychological testing conducted on Penry from the age of eight through his 1980 trial places his IQ somewhere between 50-63, a range of moderate to mild mental retardation, and supports the district court's characterization of Penry as having "the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child (B. 4). Notwithstanding the evidence of Penry's

limited mental capacity, the district court denied habeas relief, reasoning primarily that "the [Constitution] does not proscribe [a death] sentence for the mentally deficient" and "the prohibition against execution of those unable to understand the reason for their punishment apparently does not apply to a person like Penry who has been adjudicated a competent man" (B. 5). The court below affirmed on the basis of well settled law of that circuit (A. 3).

The district court correctly found that prior to trial a comprehensive, separate competency hearing was held in state court (SF V-VII), and it presumed correct the jury's finding that Penry had sufficient present ability to consult with his lawyers with a rational degree of understanding and had a rational as well as factual understanding of the proceedings against him, or in other words, that he met the Texas standard for competence to stand trial. Tex. Code Crim. Proc. Ann. art. 46.02 §1(a) (Vernon 1981) (ROA 14; SF VII 944). See 28 U.S.C. § 2254(d); Maggio v. Fulford, 462 U.S. 111, 117 (1983). In addition, Penry raised an insanity defense at the guilt phase of his trial (SF XVI 2114-2321; XVII 2398-2422), and offered evidence of his diminished mental capacity to the jury for its consideration in the sentencing proceeding (SF XVII 2642-55). Both his guilt and punishment defenses were rejected by the trial jury, thus confirming the jury's belief that Penry knew right from wrong, was capable of conforming his conduct to the requirements of the law, committed the capital murder deliberately and with reasonable expectation of his victim's death, and constituted a future threat to society. Tex. Penal Code Ann. art. 8.01 (Vernon 1974); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).

Penry's sole challenge is to the legal conclusion of the courts below that a defendant who has been adjudged competent at his trial does not qualify as an "idiot" under Ford. In fact, Ford itself does not support Penry's position. While the plurality opinion of four justices deferred developing standards for the enforcement of the constitutional restriction on the state's

execution of its sentences, Ford v. Wainwright, ___ U.S. at ___, 106 S.Ct. at 2606, the pivotal concurring opinion of Justice Powell states a "precise formula for determining what process is due." Johnson v. Cabana, 818 F.2d 333, 337 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 2207 (1987). As Johnson recognizes, Ford precludes the execution of a defendant who is unable "to perceive the connection between his crime and punishment." Id. at 336. Or in Justice Powell's terms: "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." ___ U.S. at ___, 106 S.Ct. at 2608-09.

Both the state courts and the federal habeas courts below found as a factual matter that Penry does not meet this standard. Thus, his argument is based on nothing more than disagreement with these factual findings, a matter clearly insufficient to warrant exercise of the Court's certiorari jurisdiction. The record clearly reveals that the courts below applied the correct constitutional standard in rejecting Penry's claim. The issues raised by Penry concern only the application of well-settled constitutional principles to his particular factual situation. This Court sits to decide important, novel or recurring questions, not to review evidentiary determinations founded on settled principles of law. Penry's claims do not justify the exercise of this Court's certiorari jurisdiction. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

IV.

PENRY'S CLAIM THAT HIS CONFESSIONS WERE INVOLUNTARY BECAUSE HE DID NOT KNOWINGLY RELINQUISH HIS RIGHT TO REMAIN SILENT IS MERITLESS IN LIGHT OF THE FACTUAL FINDINGS OF THE STATE COURTS.

Penry contends that both of his confessions should have been suppressed because they were made without a knowing relinquishment of his privilege against self-incrimination. The proper

standard of review for determining waiver was recently discussed by this Court in Moran v. Burbine, ___ U.S. ___, ___, 106 S.Ct. 1135, 1141 (1986):

Echoing the standard first articulated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), Miranda holds that "[t]he defendants may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444, 475, 85 S.Ct. at 1612, 1628. The inquiry has two distinct dimensions. Edwards v. Arizona, supra, 451 U.S. at 482, 101 S.Ct. at 1883; Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

The issue of voluntariness of a confession and waiver is a legal question requiring independent federal determination. Miller v. Fenton, ___ U.S. ___, ___, 106 S.Ct. 445, 450 (1986). The factual determinations subsidiary to the determination are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Id.

The first aspect of the test set forth in Burbine is that "the relinquishment must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." The trial court found that "from all the evidence that the Defendant was not induced or coerced by any person to give or make such written statement[s] by threats, persuasion, compulsion, intimidation, promises, unlawful detention, or anything else." (Tr. 94-95). The record evidence reflects more than fair support for the trial court's findings. The law enforcement authorities involved in the investigation and the witnesses to the signing each testified that no such inducements were given (SF IV 147, 217-18, 230-31,

243; XIV 1722, 1834; XV 1881, 1891, 1981, 2046). Penry testified at the competency hearing that there was no coercion or inducements (SF VI 533), and that he told the officers what to write (SF VI 543, 546-48). Until Penry admitted to having committed the crime, he was unrestrained and accompanied the officers of his own volition (SF IV 140-41, 144, 150-52, 156, 163, 175-78; XIV 1576, 1587-88, 1624-27, 1659).

It is undisputed that Penry initiated the conversation resulting in his first admission, over Officer Nelson's admonition to be quiet (SF IV 154; XIV 1608-10, 1618). See Moran v. Burbine, ___ U.S. at ___, 106 S.Ct. at 1141. When Penry made the oral statement confessing to the crime in the magistrate's courtroom it was in response to his father's questioning, not the law enforcement authorities (SF IV 184, 205-07; XIV 1845). Penry never invoked any of his rights. Further, the words in the confessions were Penry's, as he himself testified (SF VI 543). Any subtle coercion which might be present in police interrogation was simply absent here.

The second aspect of the test is the "awareness of the right being abandoned and the consequence of the decision to abandon it." The record does reflect, as Penry contends, that Penry is of low intellect and that his IQ falls in the mild-moderate mental retardation range. However, each of the persons who came in contact with Penry testified that at no time did he act in an emotional, bizarre or crazy manner; that he appeared to understand questions asked and responded in a rational manner; that they were able to understand and communicate with Penry; that Penry stated that he understood his rights; that he freely gave detailed information; and, that he had no trouble with recall (SF IV 157, 170, 189-90, 205, 226; XIV 1628, 1632-36, 1653, 1659, 1675, 1807-09, 1833, 1849, 1855; XV 1881, 1890, 1980, 1982-83, 1990-91, 1997, 2015, 2018, 2046).

The officers were aware that Penry was illiterate and recognized that he was a "little slow." His Miranda rights were not only read off the standard issued card, but explained

individually to him in simple terms numerous times prior to and during the giving of the statements (SF IV 165-67, 168-69, 183, 185, 190, 196, 203, 212, 223-26; VII 826-28; XV 1995, 2020, 1982, 1984-85). Penry's father, who certainly would be aware of his intellectual limitations, told Penry in the magistrate's courtroom not to sign the acknowledgement of rights form given to him by the magistrate. The magistrate informed the father that the rights had been read and that Penry said he understood. To this the father responded that Penry "can't write" and he then administered the warnings (SF IV 184, 205-07; XIV 1845). Finally, Penry stated he understood he was charged with capital murder and the consequences of those charges (SF VI 487, 490; VII 782, 785, 850). Psychiatric testimony indicated Penry had the capacity to understand Miranda warnings. The statements were read to Penry before signing in their entirety, including the warnings and waivers, slowly and carefully because Penry could not read (SF IV 190-92, 216-17, 228-30, 241-42). Express statements of waiver are contained in both.

The evidence underlying the state and federal courts' conclusions is not disputed in Penry's petition to this Court. His claim rests entirely on his assertion that "capital murder was [n]ever explained to him in terms he could understand [and] that he was [never] cautioned that signing the statement[s] could be used to give him the death penalty." (Petition at 20). This claim, however, is foreclosed by the Court's recent decision in Colorado v. Spring, ___ U.S. ___, 107 S.Ct. 851 (1987), wherein the Court rejected the proposition that the Constitution requires that a criminal suspect know and understand every possible consequence of a waiver of the fifth amendment privilege.

The totality of the circumstances reflect a non-coercive situation and express waivers of Penry's Miranda rights. While an express waiver "is not inevitably either necessary or sufficient to establish waiver," it is "usually strong proof of the validity of the waiver." North Carolina v. Butler, 441 U.S. 370, 373 (1979). This, coupled with the absence of deliberate means

calculated to break Penry's will, his desire to confess, the repeated and individualized administration of warnings, the explanation of rights in simple terms, and an ability on Penry's part to understand the proceedings and nature of his crime and the effect of confessing is more than sufficient to support the conclusion of the courts below that Penry knowingly relinquished his privilege against self-incrimination. Penry again asks the Court to review factual matters resolved against him by the courts below. To do so would be an unwarranted exercise of the Court's certiorari jurisdiction.

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

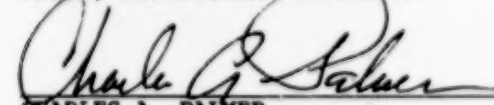
Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU MCCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division


CHARLES A. PALMER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

87-6177

NO. _____

JOHNNY PAUL PENRY,
PETITIONER

V.

JAMES A. LYNAUGH,
RESPONDENT

§
§
§
§
§
§

IN THE

SUPREME COURT

OF THE UNITED STATES

MOTION FOR LEAVE TO PROCEED AS A PAUPER ON PETITION
FOR WRIT OF CERTIORARI

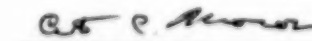
Johnny Paul Penry, moves this court for leave to proceed as a pauper on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Attached to this motion is Petitioner's Affidavit in Support of Motion to Proceed in Forma Pauperis on Petition for Writ of Certiorari. Leave to proceed in forma pauperis was sought and granted in the trial court, Texas Court of Criminal Appeals, the United States District Court, Eastern District of Texas, Lufkin Division and in the United States Court of Appeals for the Fifth Circuit.

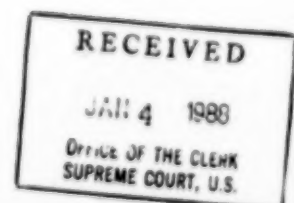
Attached to this Motion is Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.


Curtis C. Mason

CERTIFICATE OF SERVICE

I, Curtis C. Mason, Attorney for Respondent, do hereby certify that a true and correct copy of the above and foregoing Motion for Leave to Proceed as a Pauper on Petition for Writ of Certiorari, has been forwarded by United States Mail, postage prepaid, first class, to the Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711 on this the 30 day of December, 1987.


Curtis C. Mason
Attorney for Respondent



No. _____

JOHNNY PAUL PENRY,
PETITIONER

V.

JAMES A. LYNAUGH,
RESPONDENT

§ IN THE
§
§
§ SUPREME COURT
§
§
§ OF THE UNITED STATES

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS ON PETITIONER FOR WRIT OF CERTIORARI

I, JOHNNY PAUL PENRY, being first duly sworn, depose and say that I am the Petitioner in the above styled cause; in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for writ of certiorari are true.

1. Are you presently employed?

No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you have any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property?

No.

5. List the persons who are dependant upon you for support and state your relationship to these persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

X Johnny P. Penry
JOHNNY PAUL PENRY

SUBSCRIBED AND SWORN TO before me on this the 28 day of December, 1987, to certify which witness my hand and seal of office.

Jay M. [Signature]
NOTARY PUBLIC, in and for
The State of Texas

My commission expires on:

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. 87-6177

JOHNNY PAUL PENRY,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI

Petitioner JOHNNY PAUL PENRY, by counsel, supplements his
pending petition for writ of certiorari with the following:

1. On June 22, 1988, the Court announced its decision in
Franklin v. Lynaugh (No. 87-5546). If the holding of the Court
in Franklin is the position taken by Justices O'Connor and
Blackmun in the concurring opinion -- as we believe it is -- then
Mr. Penry's case presents the very question which the concurring
opinion held "[the Court] would have to decide" when properly
presented. Franklin v. Lynaugh, slip op. at 3 (O'Connor, J.,
joined by Blackmun, J., concurring).

2. The question which concerned the concurring justices in
Franklin is whether Texas' special verdict questions might be
inadequate to permit the jury to give effect to its consideration
of the mitigating evidence in a particular case. If the
mitigating evidence is not relevant to one of the special verdict
questions, or if it has mitigating value beyond their scope, the
concurring justices believed that the jury would be precluded
from considering the evidence in the manner required under the
Eighth Amendment. As Justice O'Connor explained,

If . . . petitioner had introduced mitigating evidence
about his background or character or the circumstances
of the crime that was not relevant to the special

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH R. SPANIOLO, JR.
CLERK

verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence.

Id. It is in "such a case" that "we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." Id.

3. Mr. Penry's case is just such a case. The mitigating evidence in his case focused upon his mental retardation and the emotional and physical abuse he suffered as a child. He could not read or write, he never finished the first grade, and his emotional development was that of a child. He was beaten as a child and locked in a room for hours at a time without access to a toilet. He was in and out of a number of state schools. "One effect of his mental retardation was his inability to learn from his mistakes." Penry v. Lynaugh, 832 F.2d 915, 925 (5th Cir. 1987).

4. While in some respects Mr. Penry's mitigating evidence was relevant to both of the special verdict questions, in other respects it was not. And insofar as it was relevant, the mitigating evidence plainly "had relevance to [his] moral culpability beyond the scope of [those] questions," Franklin, supra, at 3 (emphasis supplied). With respect to the deliberateness question, Mr. Penry's mitigating evidence was at once relevant and irrelevant:

Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not.

832 F.2d at 925. As to whether Mr. Penry would be a continuing threat to society, his mitigating evidence "had relevance to [his] moral culpability beyond the scope of [that] question[]," Franklin, supra.

The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made

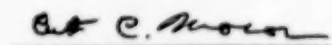
it more likely, not less likely, that the jury would answer the second question yes.

Id. (footnote omitted). While the evidence of retardation supported an affirmative answer to the second question, it also supported the view that Mr. Penry should not be executed, precisely because his retardation was a major factor contributing to his dangerous behavior. Yet the instructions "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence," Franklin, supra, if it believed that Mr. Penry's retardation was a reason to impose life instead of death.

5. In the view of the concurring justices, therefore, Mr. Penry's case presents the grave constitutional question that was not presented by Franklin. Moreover, this question is not foreclosed by the opinion of the Franklin plurality, for the concurring justices did not join the rationale of the plurality, which embodied the broader view "that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty." Franklin, supra, at 1 (concurring opinion). In these circumstances, the view of the concurring justices, rather than of the plurality, represents the holding of the Court. See Marks v. United States, 430 U.S. 188, 193 (1977) (when no single rationale supporting the result commands a majority of the Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

6. Franklin having expressly left open -- yet pointing to the need to decide -- the question presented squarely by the facts of Mr. Penry's case, certiorari should be granted.

Respectfully submitted


CURTIS C. MASON
Attorney for Petitioner
Staff Council for Inmates
P.O. Box 99
Huntsville, TX 77342-0099
(409) 294-2370

Certificate of Service

I, Curtis C. Mason, a member in good standing of the Bar of the Court, hereby certify that the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari has been served upon respondent by sending a copy, via first class mail, to his counsel, Jim Mattox, Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 24th day of June 1988.

C. C. Mason
Curtis C. Mason

NO. _____

87-6177

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

JOHNNY PAUL PENRY,
Petitioner

V.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS
Respondent

Petition for Writ of Certiorari
To the United States Court
Of Appeals for the Fifth Circuit

APPENDIX A, B AND C

Curtis C. Mason
Staff Counsel for Inmates
Texas Department of Corrections
P.O. Box 99
Huntsville, Texas 77342-0099

ATTORNEY FOR PETITIONER

APPENDIX A
OPINION OF THE FIFTH CIRCUIT

CORRECTED

PENRY v. LYNAUGH

669

Johnny Paul PENRY,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 87-2466.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1987.

Defendant convicted of murder and sentenced to death filed petition for habeas corpus. The United States District Court for the Eastern District of Texas, William M. Steger, J., denied the writ, and defendant appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) defendant's confession and waiver of *Miranda* rights were voluntary; (2) defense had procedurally defaulted on issue of exclusion of one venireman for cause; and (3) although Texas capital sentencing procedure was arguably inconsistent with developing death penalty law in adequacy of jury's consideration of mitigating circumstances before imposition of death penalty, procedure had been expressly held constitutional by the United States Supreme Court.

Affirmed.

Garwood, Circuit Judge, filed concurring opinion.

1. Criminal Law §1213.8(8)

It is not cruel and unusual punishment to execute a mentally retarded person. U.S.C.A. Const.Amend. 8.

2. Habeas Corpus §45.1(4)

State had provided defendant convicted of murder with a full and fair opportunity for litigation of the claims that state limited his investigator's fees, that a police officer who testified at both suppression hearing and trial lied at suppression hearing, and that state failed to provide him with one of his previous confessions, and defendant failed to show what difference more investigator's fees or having his previous confession would have made; thus, defendant could not raise a Fourth Amendment claim of illegal arrest in his habeas corpus petition. U.S.C.A. Const.Amend. 4.

3. Criminal Law §517.2(2), 519(1)

Defendant convicted of murder who claimed his waiver of *Miranda* rights was not voluntary, based on his low intellect and inability to freely confess or waive his rights, failed to show any police misconduct which would taint confessions or waiver as required to find that confession was not "voluntary" within meaning of due process clause of Fourteenth Amendment. U.S. C.A. Const.Amend. 5, 14.

4. Habeas Corpus §45.3(1.40)

Habeas corpus petitioner was precluded, by procedural default, from consideration on the merits of whether exclusion of one venireman for cause was improper where, at trial, defense counsel originally objected to state's motion to exclude venireman from cause, but after a number of attempts at rehabilitation, counsel withdrew his objection and challenge for cause was granted.

5. Criminal Law §1208.1(5)

In the penalty phase of a capital case, a sentencing authority must not be precluded

Synopsis, Syllabi and Key Number Classification
COPYRIGHT © 1987 by WEST PUBLISHING CO.

The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

ed from considering any or almost any mitigating evidence. U.S.C.A. Const. Amend. 8.

6. Criminal Law §1208.1(5)

Requirement arising out of United States Supreme Court decision in *Sumner v. Shuman* that sentence not be precluded from "considering" any mitigating circumstance in capital case means that sentence must not be precluded from listening to and acting upon any mitigating circumstance; jury may not be precluded from allowing evidence of mitigation to enter into its decision. U.S.C.A. Const. Amend. 8.

Appeals from the United States District Court for the Eastern District of Texas.

Before REAVLEY and GARWOOD, Circuit Judges.*

REAVLEY, Circuit Judge:

This is a collateral attack upon the death sentence by a Texas court of Johnny Paul Penry. With one exception all of the contentions advanced on Penry's behalf are easily rejected. The exceptional contention is that Texas law did not permit the jury to consider, and to apply, all of Penry's personal mitigating circumstances prior to reaching the verdict that mandated his death sentence. We are bound by superior authority to reject that contention, but we discuss the problem fully to demonstrate why it may merit further consideration.

* Due to his death on October 19, 1987, Judge Robert M. Hill did not participate in this

I.

On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped, and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, but she was able to relay a description of her assailant to the first police officer on the scene and to the doctor in the hospital.

The description led two local sheriff's deputies to suspect Penry. They went to the house of Penry's father, where Penry was staying. Penry denied any involvement but voluntarily agreed to go with the officers to the police station.

At the police station the officers and Penry were met by a number of other local law enforcement agents. They read Penry his *Miranda* rights and questioned him about a wound on his back. After being warned again, Penry signed a consent to search form. Everybody then went back to the Penry home to retrieve a shirt he had worn earlier that day.

Penry then accompanied the police officers to the scene of the crime. There Penry, for the first time, stated that he had "done it." He was immediately arrested, handcuffed, and read his rights again. He was brought back to the police station and taken before a magistrate. Penry was formally charged with capital murder. The magistrate read and questioned Penry about whether he understood his rights. Penry stated that he understood his rights and signed the warning forms.

Police Chief Bill Smith then questioned Penry after again warning him. Penry agreed to give a statement. Smith took the statement in notes and turned it over to

decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

his secretary to type. After the statement was typed, because Penry could not read, it was read to him in front of two non-police witnesses. That statement described the crime in detail, and Penry signed it.

Texas Ranger Cook took a second statement the following day. Again, the statement was read back to Penry in front of two non-police witnesses, and it contained the *Miranda* warnings and a statement that the rights were being waived. The second statement told of the crime in even more detail and contained confessions of Penry's previous crimes.

These two statements formed the heart of the prosecution against Penry. The statements were consistent with the other evidence, including proof that Penry had been at Ms. Carpenter's house once before, Ms. Carpenter's statement about being raped and stabbed, the bloody scissors found at the scene, and the position of the victim's clothing as described by the ambulance attendant. However, there was no physical evidence (blood, semen, fingerprints or hair samples) linking Penry to the scene of the crime.

At a competency hearing before trial, Penry was shown to have limited mental ability. He could not read or write, having never finished the first grade. His IQ indicated mild to moderate retardation. He had been in and out of a number of state schools. His relatives testified that he was beaten as a child and had behaved strangely as both a child and a teenager. Nevertheless, a jury found him competent to stand trial.

At the guilt/innocence phase of his trial, evidence of Penry's limited mental capacity was reintroduced. There was disagreement among the three testifying psychiatrists whether Penry was insane: the de-

fense psychiatrist opined that he was, but the state's two psychiatrists disagreed. There was also disagreement over the degree of Penry's mental limitation and the cause of the limitations. However, all of the psychiatrists agreed that Penry had mental limitations, whether caused by a birth trauma or by childhood environmental factors such as beatings and being locked in his room for extended periods of time. They also agreed that Penry's problems manifested themselves, among other ways, in an inability to learn from his mistakes.

The jury rejected Penry's insanity defense and found him guilty of capital murder. Tex. Penal Code Ann. § 19.03 (Vernon 1974). The jury then answered "yes" to all three "special issues," and Penry was sentenced to death. Tex. Crim. Proc. Code Ann. art. 37.071 (Vernon 1981 & Supp. 1987). The Texas Court of Criminal Appeals affirmed the conviction and sentence. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986).

II.

[1] Penry argues that it would be cruel and unusual punishment to execute a mentally retarded person such as himself. He cites *Ford v. Wainwright*, 477 U.S. 399, —, 106 S.Ct. 2595, 2600, 91 L.Ed.2d 335 (1986), for the proposition that "idiots and lunatics are not chargeable for their own acts." An identical claim has recently been rejected by this court. *Brogdon v. Butler*, 824 F.2d 338, 341 (5th Cir. 1987). Penry's claim is without merit.

[2] Penry raises a number of issues regarding his two confessions. He first claims that they should have been suppressed because they were the fruit of an

illegal arrest. A Fourth Amendment claim of illegal arrest is foreclosed in habeas if the state "provided an opportunity for full and fair litigation" of the claim. *Stone v. Powell*, 428 U.S. 465, 493-95, 96 S.Ct. 3037, 3052-53, 49 L.Ed.2d 1067 (1976). Recognizing the *Stone* bar, Penry argues that he did not have a "full and fair" suppression hearing. He claims that the state limited his investigator's fees, that a police officer who testified at both the suppression hearing and trial lied at the suppression hearing, and that the state failed to provide him with one of his previous confessions. Penry's claims are without merit. Penry does not point out what difference more investigator's fees, or having his previous confession, would have made. The police officer's testimony at the suppression hearing was not inconsistent with his trial testimony. We have made an "independent evaluation of the state court record" and are satisfied that Penry's "opportunity to contest the introduction of incriminating evidence resulting from his arrest was not circumscribed." *Billiot v. Maggio*, 694 F.2d 98, 100 (5th Cir.1982). *Stone* bars relitigation of the issue here.

[3] Penry also argues that his confession was involuntary and that he did not voluntarily waive his *Miranda* rights. Most of Penry's argument on both issues centers on his low intellect and inability to freely confess or waive his rights. However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, — U.S. —, —, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). Similarly, "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment;

it goes no further than that." *Connelly*, 107 S.Ct. at 524. We have carefully examined the record, as is our duty, see *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (ultimate question of voluntariness of confession subject to plenary review by federal habeas court), and can find no evidence of police misconduct that would taint the confessions or waiver of rights. Both the confession and waiver of *Miranda* rights were voluntary.

[4] Penry also challenges the exclusion of one venireman for cause. Citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the state argues that Penry procedurally defaulted on the issue. When the state court opinion is silent as to whether it used the procedural bar,

this Court will consider "whether the state court has used procedural default in similar cases to preclude review of the claim's merits, whether the history of the case would suggest that the state court was aware of the procedural default, and whether the state court's opinions suggest reliance upon procedural grounds or a determination of the merits."

Ortega v. McCotter, 808 F.2d 406, 408 (5th Cir.1987) (quoting *Preston v. Maggio*, 705 F.2d 113, 116 (5th Cir.1983)). In the state habeas claim here, the only time that issue was raised, the state court simply denied the writ without an opinion. However, Texas has consistently applied a procedural bar to exclusion of veniremen without objection. *Hawkins v. State*, 660 S.W.2d 65, 82 (Tex.Crim.App.1983). Similarly, the state court was aware of the procedural bar in this case since the state raised the bar in its reply to Penry's state habeas claim. Therefore, under the *Preston* test, the claim is barred if Penry failed to object to the exclusion at trial.

At trial, Penry's counsel originally objected to the state's motion to exclude the venireman for cause. However, after a number of attempts at rehabilitation, counsel withdrew his objection and the challenge for cause was granted. Penry argues that the attorney's argument was not "an expressed withdrawal of the objection but a statement of resignation to the fact that the Court was going to grant the State's challenge for cause in spite of the objection." We disagree. Our reading of that part of the voir dire convinces us that counsel did expressly withdraw his objection. He did so "regretfully" because he wanted the juror but knew that the juror could not be rehabilitated. The *Sykes* bar precludes our consideration of the merits of the issue.

III.

A.

The jury rejected Penry's insanity defense and found him guilty of capital murder.¹

I. At the time of Penry's offense, section 19.03 of the Texas Penal Code Ann. (Vernon 1974) provided:

(a) A person commits an offense [of capital murder] if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

der.¹ The Texas bifurcated statutory scheme then provides for the jury to decide the sentence by answering three "Special Issues":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Crim.Proc.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). If the jury unanimously answers "yes" to all three questions, the court must sentence the de-

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

Penry was found guilty of a violation of subsection (a)(2), "in the course of committing and attempting to commit the offense of aggravated rape." *Penry v. State*, 691 S.W.2d at 641.

Subsequent amendments have changed "aggravated rape" to "aggravated sexual assault" and have added:

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

Texas Penal Code Ann. § 19.03 (Vernon Supp.1987).

fendant to death. Tex.Crim.Proc.Code Ann. art. 37.071(c)(e) (Vernon 1981 & Supp. 1987). Otherwise, the defendant must be sentenced to life imprisonment. *Id.* Here, additional evidence was introduced in the sentencing phase. The jury was then instructed, *inter alia*:

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

The jury instructions then proceeded to list, without definition, the three special issues with names of the defendant and decedent inserted.

Penry objected to the jury charge. He complained that the court failed to define "deliberately," "probability," "criminal acts of violence" and "continuing threat to society." He also objected that the court failed to instruct the jury to weigh aggravating and mitigating circumstances and failed to authorize a discretionary grant of mercy based on the existence of mitigating circumstances.

The objections were overruled and the jury answered "yes" to all three special issues. Penry was sentenced to death. On direct appeal, the Texas Court of Criminal Appeals rejected Penry's objections to the jury charge. *Penry v. State*, 691 S.W.2d at 653-54. The court held that the words used in the special issues need not be defined because the jury could understand the words' common meaning. *Id.* With

respect to Penry's argument on weighing of aggravating/mitigating circumstances, the court stated that

it has in effect been answered by the Supreme Court's opinion in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upholding this State's statutory scheme for imposing capital murder. Our statutory scheme allows for broad consideration of aggravating and mitigating factors. V.T.C.A. Penal Code, Sec. 19.03 ensures that imposition of the death sentence is not even a possibility if certain aggravating circumstances are not proven beyond a reasonable doubt by the State.

Defendants are allowed to present all possible relevant mitigating information at the punishment hearing, as part of the effort to aid the jury in answering the special issues.

Defense counsel is allowed to argue against the death penalty in general, or its imposition in the particular case at hand in light of all relevant mitigating factors. In sum, the Texas death penalty scheme passes constitutional muster despite failure to require the jury to find that aggravating factors outweigh mitigating ones.

Id. at 654.

The jury was allowed to hear all evidence that might mitigate the culpability of Penry's deeds or his person. The jury could then consider (i.e. *think about*) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether Johnny Paul Penry should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most cru-

cial decision. Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more. The court, following Texas law, ends the matter and orders death. It is difficult to see how this procedure accords with some of the Supreme Court's writings on the Eighth Amendment's mandate of individualized application of all mitigation along with aggravation in the sentencing decision. In order to explain our concern, we must look further at the Supreme Court's writings on capital punishment.

B.

The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), laid the foundations for the post-*Furman*² era of capital punishment. The plurality³ in *Gregg* held that the Georgia capital punishment statute was constitutional. 428 U.S. at 207, 96 S.Ct. at 2941. That statute provided for a bifurcated trial with the guilt/innocence phase followed by a punishment stage. *Id.* at 195, 96 S.Ct. at 2935. At the punishment stage, the jury had to find at least one aggravating circumstance before it could impose the death penalty. *Id.* at 197, 96 S.Ct. at 2936. Additionally, at the punishment phase, the jury could consider any other aggravating or any mitigating circumstances before imposing either death or life imprisonment. *Id.*

2. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* effectively struck down all capital punishment statutes in place at that time.

3. Only three members of the Court, Justices Stewart, Powell and Stevens, were in the majority in *Gregg* as well as the four other death penalty cases decided that day. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913

Although the Court warned that "each distinct system must be examined on an individual basis," *id.* at 195, 96 S.Ct. at 2935, two basic principles stand out. First, in order to pass constitutional muster, the sentencer's⁴ discretion must be narrowed. That can be accomplished by the finding of aggravating circumstances either about the crime or the defendant involved. Second, the sentencer must consider the circumstances and the defendant involved. That is usually done through consideration of mitigating circumstances.

The other four cases decided on the same day as *Gregg* all involved application of the two basic principles. In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the Court struck down a North Carolina law that mandated the death penalty for "a broad category of homicidal offenses." 428 U.S. at 287, 96 S.Ct. at 2983. The Court found that one of the statute's "constitutional shortcomings" was that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303, 96 S.Ct. at 2991. Likewise, the Louisiana mandatory death penalty, even though it was considerably narrower than North Carolina's and provided for jury instruction on lesser included offenses even if not warranted by the evidence, was, for similar reasons, found to be unconstitutional.

(1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Those opinions, as confirmed by subsequent decisions, represent the law involved.

4. The sentencer may be a judge instead of a jury. See discussion concerning *Proffitt*, *infra* slip opinion at pp. 675-676, pp. — — —.

Roberts v. Louisiana, 428 U.S. 325, 332, 335-36, 96 S.Ct. 3001, 3005, 3007, 49 L.Ed.2d 974 (1976).

The Florida statute was considered by the Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). That statute, similar to Georgia's, required the sentencer (the judge with an advisory jury) to weigh eight enumerated aggravating circumstances against seven enumerated mitigating circumstances. *Id.* at 251, 96 S.Ct. at 2966. The Court found the statute constitutional since the aggravating factors serve to narrow the focus on the crime and the mitigating factors force the sentencer to "focus on the individual circumstances of each homicide and each defendant." *Id.* at 252, 96 S.Ct. at 2966.

The Court, on the same day as *Gregg*, *Proffitt*, *Roberts*, and *Woodson*, considered the Texas statute at issue here. The Court first held that the Texas definition of capital murder in § 19.03 was the equivalent of finding "a statutory aggravating circumstance before the death penalty may be imposed." *Jurek v. Texas*, 428 U.S. 262, 270, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976). The Court then addressed the issue of mitigating circumstances:

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson v. North Carolina* to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts v. Louisiana*. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg v. Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors, and in *Proffitt v. Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look

to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. 522 S.W.2d, at 939-940.

Id. at 271-73, 96 S.Ct. at 2956-57 (citations and footnotes omitted). The Court then concluded:

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

Id. at 273-74, 96 S.Ct. at 2957 (footnotes omitted).

We have no doubt that the Texas statute sufficiently narrows the circumstances in which death is imposed. Instead, we are concerned with *Gregg's* second part; the individual consideration of the circumstances of the crime and the character of the individual. That law has not been stagnant since *Gregg*. The Supreme Court has developed what is meant by individualized consideration.

Two years after *Gregg*, the Court considered an Ohio capital punishment statute

that required the death penalty unless one of three narrowly drawn mitigating circumstances was present. *Lockett v. Ohio*, 438 U.S. 586, 593-94, 98 S.Ct. 2954, 2959, 57 L.Ed.2d 973 (1978). The Court found the statute unconstitutional, holding

that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604, 98 S.Ct. at 2964-65 (emphasis in original).

In *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982), the defendant, 16 years old at the time of the murder, offered evidence of his troubling family background and his emotional disturbance. In sentencing *Eddings* to death, the trial judge stated that "in following the law, he could not 'consider the fact of this young man's violent background.'" *Id.* at 112-13, 102 S.Ct. at 876. The Court found that the sentencing violated the rule in *Lockett*:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence *Eddings* proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-15, 102 S.Ct. at 876-77 (footnotes omitted).

After *Eddings*, the Court has made clear that the range of mitigating factors that must be considered is very wide. For example, in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the Court reversed a death sentence because the trial court refused to allow evidence of Skipper's good adjustment to prison. Since that relevant mitigating evidence was excluded the Court reversed on *Eddings* grounds. *Skipper*, 476 U.S. at —, 106 S.Ct. at 1673.

The most recent Supreme Court case to look at mitigating evidence was *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In that case, the defendant Hitchcock introduced evidence of consequences of his childhood habit of inhaling gas fumes, together with other misfortunes of his youth. *Hitchcock*, 107 S.Ct. at 1823-24. The court of appeals affirmed the denial of habeas relief holding that the presentation of the evidence and Hitchcock's attorney's argument to "consider the whole picture, the whole ball of wax," was sufficient to show that he had "an individualized sentencing hearing." *Hitchcock v. Wainwright*, 770 F.2d 1514, 1518 (11th Cir.1985) (en banc), *rev'd sub nom.*, *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). A unanimous Supreme Court reversed. *Hitchcock*, 107 S.Ct. at 1821. Instead of looking to what evidence was presented to the jury and the argument of defense counsel, the Court focused on the jury instructions and the prosecutor's argument. *Id.* at 1823-24. The Florida statute at the time of trial provided for consideration of certain enumerated aggravating circumstances and certain enumerated mitigating circumstances. *Id.* at 1822-23. Although

there was some doubt whether the Florida statute prohibited the use of nonstatutory mitigating circumstances, the court did not address the issue "[b]ecause our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly...." *Id.* at 1823. The Court focused on both the prosecutor's argument and the jury instructions. The prosecutor told the jury "to consider the mitigating circumstances and consider those by number," and he went down the list item by item. *Id.* at 1824. The trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following" and then listed the statutory mitigating circumstances. *Id.* at 1824. The Court concluded: "[w]e think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, *Eddings v. Oklahoma*, and *Lockett v. Ohio*." *Id.* (citations omitted).

[5, 6] It is therefore abundantly clear that a sentencing authority must not be precluded from considering any, or almost any, mitigating evidence. The issue here is what the term "consider" means. The Supreme Court has held that presentation of mitigating circumstances to the sentencing authority is not enough: "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but *Lockett* requires the sentencer to listen to that evidence." *Sumner v. Shuman*, — U.S. —, —, 107 S.Ct. 2716,

2722, 97 L.Ed.2d 56 (1987) (quoting *Eddings*, 455 U.S. at 115, n. 10, 102 S.Ct. at 877, n. 10). We read the Court's command that the sentencer not be precluded from "considering" any mitigating circumstance to mean that the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. See *Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44, 77 L.Ed.2d 235 (1983). It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision.

The Supreme Court, in effect, has approached capital cases from two different ends. First, "a State must 'narrow the class of murderers subject to capital punishment,' by providing 'specific and detailed guidance' to the sentencer." *McCleskey v. Kemp*, — U.S. —, —, 107 S.Ct. 1756, 1772-73, 95 L.Ed.2d 262 (1987) (citations omitted) (citing *Gregg*, 428 U.S. at 196, 96 S.Ct. at 2936 and *Proffitt*, 428 U.S. at 253, 96 S.Ct. at 2967). On the other side, "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." *McCleskey*, 107 S.Ct. at 1773; see also *Shuman*, 107 S.Ct. at 2723 (Eighth Amendment violated by statute that requires the death sentence for defendant who murders while serving a life sentence without the possibility of parole); see generally *California v. Brown*, — U.S. —, —, 107 S.Ct. 837, 841-42, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring) (discussing the "tension" between "the two central principles of our Eighth Amendment jurisprudence").

Turning back to the Texas sentencing procedure, we see that the jury is to respond to three "special issues." The third issue involves provocation by the deceased. Tex.Crim.Proc.Code Ann. art. 37.071(b). It rarely enters into the decision of the jury. Instead, the focus is on the first two questions: whether the killing was deliberate with the reasonable expectation that death would follow and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Crim.Proc.Code Ann. art. 37.071(b). The Texas Court of Criminal Appeals has consistently held that the words of these special issues have clear meanings that need no definition. *Penry*, 691 S.W.2d at 653-54. The jury is instructed, as here, that in answering "each Special Issue you may take into consideration all of the evidence...." No jury instruction on mitigating evidence is necessary because "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." *Cordova v. State*, 733 S.W.2d 175, 190 (Tex.Crim.App. 1987) (quoting *Quinones v. State*, 592 S.W.2d 933, 947 (Tex.Crim.App.), *cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980)).

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to

society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory.⁵ The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

We recognize that *Jurek* specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require.⁶ Perhaps, it is time to reconsider *Jurek* in light of that developing law.⁷

5. Commentators have expressed similar views. See Benson, *Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity*, 23 S.Tex.L.J. 315 (1982); Green, *Capital Punishment, Psychiatric Experts, and Predictions of Dangerousness*, 13 Capital U.L.Rev. 533 (1984). Green argues that once the prosecutor's psychiatrist pronounces a defendant a sociopath, as usually happens, the answer to the future dangerousness issue is preordained. *Id.* at 553.

7 The United States Supreme Court has recently granted certiorari in *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3287 (U.S. Oct. 9, 1987) (No. 87-5546), limited to the question:

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

The evidence is similar to that in *Hitchcock* and *Eddings*. Those cases arguably teach us that it must be considered by the sentencer. Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not. The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that

6. Justice White, concurring in part, dissenting in part and concurring in the judgment in *Lockett* states, "[i]t ... seems to me that the plurality strains very hard and unsuccessfully to avoid eviscerating the handiwork in *Proffitt v. Florida* and *Jurek v. Texas*...." *Lockett*, 438 U.S. at 623, 98 S.Ct. at 2983 (citations omitted). It was the same Florida statute that was approved in *Proffitt* that was applied unconstitutionally in *Hitchcock*.

Whether the jury may be instructed on the effect of mitigating evidence under the Texas capital punishment scheme.

Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

The state argues that Penry's counsel could, and did, argue the mitigating circumstances to the jury. The defense attorney in *Hitchcock* also argued to the jury to "consider the whole picture, the whole ball of wax." 107 S.Ct. at 1824. The prosecutor in *Hitchcock* then stood up and argued to the jury to consider the mitigating circumstances by number. *Id.* Likewise, here, the prosecutor was able to trump the defense counsel's argument:

I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He

didn't point out the weaknesses in the state's case because, ladies and gentlemen, I submit to you we've met our burden.

As in *Hitchcock*, the mere fact that defense counsel argued mitigating circumstances does not conclude the matter. The question is whether the jury could act on the mitigating circumstances and not impose the death penalty. The prosecutor's argument would exclude that consideration.

C.

Jurek expressly held that the Texas statute is constitutional. After *Jurek*, the Court has reiterated that stance a number of times. For example, in *Lockett* the Court stated that the Texas statute "survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett*, 438 U.S. at 607, 98 S.Ct. at 2966. Similar reasoning has been used in a number of other cases. See, e.g., *Zant*, 462 U.S. at 875 n. 13, 103 S.Ct. at 2742 n. 13; *Lockhart v. McCree*, 476 U.S. 162, —, 106 S.Ct. 1758, 1769-70, 90 L.Ed.2d 137 (1986). We think that a strong argument can be made that developing law, see, e.g., *Hitchcock*, is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, see *Brock v. McCotter*, 781 F.2d 1152, 1157 n. 5 (5th Cir.), cert. denied, — U.S. —, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986), we are not free to do so because prior Fifth Circuit deci-

Penry, apparently, was approximately 22 years old at the time of the crime.

ist. be instructed on mitigating evidence under punishment scheme.

sions have rejected claims similar to Penry's. *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986); *Granviel v. Estelle*, 655 F.2d 673, 675-77 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982). These prior panel holdings bar a different holding by us.

IV.

The stay of execution is vacated. The judgment denying the writ is AFFIRMED.

GARWOOD, Circuit Judge, concurring:

I join Judge Reavley's thoughtful opinion, and append these remarks merely to further explore, from what may be my slightly different perspective, some of the possible ramifications of *Jurek* and its relationship to other Supreme Court decisions of the kind called attention to by Judge Reavley.

Undoubtedly, as Judge Reavley so cogently explains, there is a tension between the two major themes of the Supreme Court's recent capital sentencing jurisprudence, and it is certainly not inconceivable that the ultimate resolution of that tension may undermine *Jurek*. However, I do not understand us to suggest, and I do not believe, that such a result is either inevitable or desirable.

That the Court knew what it was doing in *Jurek* must be assumed not only out of proper respect for the Court, but also because of the concurring opinion therein of Justice White (joined by the Chief Justice and Justice Rehnquist), as well as Justice White's dissent (joined by the Chief Justice and Justices Blackmun and Rehnquist) in *Roberts* (Stanislaus) v. *Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and Justice Rehnquist's dissent in

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), each decided the same day as *Jurek*. Justice White's *Jurek* concurrence observed that the Texas "statute does not extend to juries discretionary power to dispense mercy." 96 S.Ct. at 2959. His dissent in *Roberts* points out that under the Texas statute upheld in *Jurek*, "capital punishment is required if the defendant is found guilty of the crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory." 96 S.Ct. at 3018. And, in *Woodson*, Justice Rehnquist's dissent points out that under the Texas system upheld in *Jurek*, "[t]he jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty must be imposed." 96 S.Ct. at 2996 (emphasis in original). It is true, of course, that Justice Stewart's plurality opinion in *Jurek* relied heavily on the breadth of circumstances which the Texas Court of Criminal Appeals in *Jurek* itself (as well as in another case) had indicated could properly be considered in answering the sentencing special interrogatories, particularly the second. 96 S.Ct. 2950 at 2956-57. However, it is to be noted in this connection that the Texas courts, both generally and in Penry's case, have kept the promise of *Jurek*, and have not to any extent narrowed the circumstances appropriate for consideration under the sentencing special issues as indicated in *Jurek*.

Moreover, since *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)—the decision most in tension with *Jurek*—the Supreme Court has cited *Jurek* favorably in numerous cases. See *Sumner v. Shuman*, — U.S. —, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v.*

McCree, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453-54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); *Zant v. Stephens*, 462 U.S. 862, 100 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). See also *Tison v. Arizona*, — U.S. —, 107 S.Ct. 1676, 1687, 95 L.Ed.2d 127 (1987) (citing *Selva v. State*, 680 S.W.2d 17, 22 (Tex.Crim.App.1984)). As reflected below, *Jurek* was likewise frequently cited with approval prior to *Eddings*. See also, e.g., *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2524 n. 1, 65 L.Ed.2d 581 (1980).

The scope of those more recent Supreme Court decisions which are in tension with *Jurek* is not entirely clear respecting what considerations the sentencer must be allowed to take into account in determining the appropriateness of a death sentence. In Penry's case, not only was the jury plainly allowed to hear and instructed to consider *all* evidence proffered, but also the special issues submitted adequately allowed the jurors to give effect to this evidence insofar as they might deem it relevant either to the moral culpability of Penry's own conduct and state of mind on the particular occasion in question or to his possible rehabilitation or future dangerousness to society. What the special issues did not afford the jury a vehicle for giving effect to was Penry's implicit plea that, although his own individual actions and state of mind on the occasion in question were morally culpable and although his character generally was such that he was

not a good prospect for rehabilitation and would pose a continuing danger to society, nevertheless he was not to blame either for his own thus unsatisfactory character, or for his own immoral conduct and state of mind on the occasion in question, because these were products of his tragically disadvantaged youth. It is not entirely clear that the Supreme Court's decisions respecting individualized consideration of the offense and offender have gone so far as to require that effective consideration always be given by the sentencer to such a plea.

The initial individualized consideration cases, *Woodson* and *Roberts* (Stanislaus), were decided the same day as *Jurek*. They each involved mandatory capital sentences for certain general categories of homicide. In *Roberts*, the Court decried the Louisiana statute's "lack of focus on the circumstances of the particular offense and the character and propensities of the offender." 96 S.Ct. at 3006. In *Woodson*, the Court noted that the North Carolina statute, which embraced the felony murder doctrine, "accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense." 96 S.Ct. at 2991 (emphasis added). Neither criticism is substantially applicable to *Jurek*. In *Roberts* (Harry) v. *Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), decided the following year, another mandatory capital sentencing scheme was struck down. The Court observed: "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer" but

which the Louisiana statute did not take into account. *Id.* at 1995 (emphasis added). Again, *Jurek* is not subject to this criticism. These statutes all had in common the prohibition of any considerations other than guilt of the particular offense.

The Court first went beyond that category of case the next year in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which involved a death sentence imposed on a twenty-one-year-old woman who was an accomplice to the murder but did not actually kill the victim. There was evidence that "her prognosis for rehabilitation" . . . was favorable," and she had no major offenses on her record. *Id.* at 2959. The sentencing statute was held invalid because it "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Id.* at 2961. Particular reliance was placed on *Woodson*, and *Jurek* was cited with apparent approval. *Id.* at 2963. Justice Blackmun limited his concurrence to cases where the death sentence was imposed on "a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969. Justice Marshall, in his concurrence, pointed out that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" and that the Ohio statute "precluded any effective consideration of her degree of involvement in the crime, her age, or her prospects of rehabilitation." *Id.* at 2972.

It is apparent that none of the considerations which *Lockett* held must be taken into account in determining whether a sen-

tence of death should be imposed, were precluded from being given effective consideration by the jury in Penry's case. Each of these considerations is relevant to either the first or second sentencing inquiry under the Texas scheme as announced in *Jurek* and applied in this case.

It is also to be noted that Justice White concurred in the result in *Lockett* on substantive grounds, namely, that the Eighth Amendment prohibited capital punishment for one who did not intend the death of the victim. *Id.* at 2983. This view was largely vindicated in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where the Court held that the death sentence could not constitutionally be imposed on one who did not kill or attempt to kill or have any intention of participating in or facilitating a killing. *Id.* at 3377. *Enmund* placed principal reliance on *Lockett* and *Woodson*. *Id.* The *Enmund* Court noted that "Enmund's own conduct" must be the basis for punishment and "[t]he focus must be on his culpability." *Id.* (emphasis in original). Consideration of the deterrence justification for punishment made defendant's state of mind particularly relevant. *Id.* The Court observed that "[a]s for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were," and that "Enmund's criminal culpability must be limited to participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* at 3378. In these passages, the Court is obviously measuring personal responsibility and moral guilt by the circumstances of the particular offense and the defendant's participation and state of mind with reference to it. These considerations appear to

be adequately taken into account in the Texas sentencing scheme. The *Enmund* analysis was reconfirmed in *Tison*, 107 S.Ct. at 1683, 1687.

Likewise, in other cases where the Supreme Court has struck down a capital sentencing scheme because of its mandatory nature or its preclusion of consideration of mitigating factors, a significant and perhaps crucial aspect of the decision has been that matters relating to the accused's own participation in the crime, or his own state of mind in respect to it, or his potential for rehabilitation or lack of future dangerousness, have been deemed legally irrelevant. Thus, in *Skipper*, the Court held that it was constitutional error to exclude evidence relevant to the accused's "probable future conduct if sentenced to life in prison," and that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." 106 S.Ct. at 1671. This was stated to be merely the converse of *Jurek*. *Id.* See also *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 382-83, 78 L.Ed.2d 187 (1983) (relevance of future dangerousness). In *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), a death sentence was set aside because the trial court deemed that it was legally barred from taking any account of certain considerations which the defendant offered in mitigation including, as the court twice mentioned, "his potential for rehabilitation" or "his capacity for rehabilitation." *Id.* at 1824. The Court noted that "the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," and further observed, quoting *Skipper*, that a capital defendant must be "permitted to present any and all relevant mitigating evidence that is available." *Id.* (emphasis added). Most recently, in *Sum-*

ner, the Court struck down Nevada's mandatory death sentence for those committing first degree murder while under a sentence to life imprisonment without possibility of parole. The Court noted that its prior decisions, including *Enmund* and *Tison*, established that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime," and that this consideration was not adequately reflected in the Nevada statute. 107 S.Ct. at 1724. *Sumner* also noted as a possible mitigating factor excluded by the Nevada law "even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct." 107 S.Ct. at 2725 (quoting *Roberts* (Harry)) (emphasis added). The *Sumner* Court went on to observe that in the case before it a possible mitigating factor which the Nevada law ignored was the defendant's "behavior during his 15 years of incarceration, including whether the inmate murder was an isolated incident of violent behavior or merely the most recent in a long line of such incidents." *Id.* at 2726. These factors are clearly consistent with *Jurek*, which, as previously noted, *Sumner* cites with approval.

Of all the cases in this area, *Eddings* is most in tension with *Jurek*. *Eddings* is certainly susceptible of the reading that considerations respecting a defendant's disadvantaged background, of the sort that Penry sought to have the jury give effect to at his sentencing hearing, may not be deemed legally irrelevant. *Eddings* observed that the sixteen-year-old defendant "had been deprived of the care, concern and parental attention that children deserve," and that "the background and mental and emotional development of a youthful defendant [must] be duly considered in

sentencing." 102 S.Ct. at 877. However, it is not entirely clear that as broad a reading as this language considered in isolation suggests must be given to *Eddings*. There the sentencing authority would, as a matter of law, consider as a mitigating factor *nothing* except *Eddings*' chronological youth. *Id.* at 873-74. The Court's opinion further points out that there was testimony from a sociologist "that *Eddings* was treatable," and from a psychiatrist "that, if treated, *Eddings* would no longer pose a threat to society." *Id.* at 873. It likewise noted a psychologist's testimony that *Eddings* had a sociopathic or antisocial personality, but that "approximately 30% of youths suffering from such a disorder grew out of it as they aged." *Id.* Apparently the Oklahoma sentencing authorities also deemed all this evidence legally irrelevant. Certainly the potential for rehabilitation, and the fact that a person can be treated so that he will not be a danger to society, or is youthful so may grow out of his difficulties, may be effectively considered under the Texas scheme. That the Court mentioned this evidence in some detail in *Eddings* suggests that it thought it significant. Justice Powell wrote the majority opinion in *Eddings* and Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. In *Skipper*, on the other hand, Justice White, who had dissented in *Eddings*, wrote the majority opinion and Justice Powell, with whom the Chief Justice and Justice Rehnquist joined, dissented on the point relevant here (although they concurred in the result on other grounds). This would appear to indicate that the Court has not fully crystallized its view on this subject.

The foregoing review of the Court's leading opinions in the area suggests that not every aspect of whatever is offered by the

defense as being in mitigation must constitutionally be given effective consideration by the sentencer. As observed, the Court has referred to "relevant" mitigating evidence, "reasonably" believed moral justification, and the "relevant" facets of the character and record of the defendant. In *California v. Brown*, — U.S. —, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the Court refused to reverse on account of an instruction that the jury could not be swayed by "sympathy" or "mere sympathy." The *Brown* Court did not regard such an instruction as inconsistent with the rule that "the capital defendant generally must be allowed to introduce any *relevant* mitigating evidence regarding his 'character or record and any of the circumstances of the offense.'" *Id.* at 839 (quoting *Eddings* quoting *Lockett*; emphasis added).

Note must also be taken of the other principal recent theme in the Supreme Court's capital punishment jurisprudence, namely, that "sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses." *Brown*, 107 S.Ct. at 839. This, of course, stems from the concurring opinions of Justices Douglas, Stewart, and White in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 2727, 2760, 2763, 33 L.Ed.2d 346 (1972). In *Godfrey v. Georgia*, 446 U.S. 4201, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court struck down a threshold aggravating circumstance as being overly vague. The plurality noted that this violated its warning in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859 (1976), that such vague standards would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Godfrey*, 100 S.Ct. at

1765 (quoting *Gregg*; emphasis added) (*Jurek* is also cited approvingly, 100 S.Ct. at 1764). In *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), where the Court held that jury sentencing was not required for capital cases, it explicated this theme as follows:

"If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Id.* at 3162.

The Court further observed that "the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable." *Id.* at 3163. Moreover, "[t]here must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Id.* at 3162 n. 7.

However, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the crucial plurality opinion by Justice Stewart, joined by Justices Powell and Stevens, had observed that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Id.* at 2939 (emphasis added). In this connection, in *Zant* the Court noted that it did not require jury instructions providing "specific standards to guide the jury's consideration of aggravating and mitigating circumstances." 103 S.Ct. at 2742. And, as the concurring opinion of Justice Stevens, joined by Justice Powell, in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 3431 n. 2, 77 L.Ed.2d 1134 (1983), rec-

ognized, neither *Lockett* nor *Eddings* established that any particular weight need be given by the sentencer to the mitigating circumstances which those cases held could not be excluded as a matter of law from any consideration.

It would appear, especially given this lack of requirement for instructional guidance or for any particular weight to be given allegedly mitigating circumstances, that the broader the range of such mitigating circumstances and the more attenuated their relationship to valid penological considerations, the more hindered is the system in the performance of its function of rationally distinguishing between those defendants for whom death is appropriate and those for whom it is not. Similarly, in such circumstances the discretion of the sentencing authority becomes more unlimited and unreviewable. It is difficult to understand how a system which requires that the sentencer be given unlimited discretion to assign whatever weight it desires to whatever it might consider to be mitigating can be fairly described as tending "to ensure that the death penalty will be imposed in a consistent, rational manner," *id.* at 3430 (concurring opinion of Stevens, J.), or to minimize "sentencing decision patterns ... [that are] arbitrary and capricious." *Godfrey*, 100 S.Ct. at 1785 (quoting *Gregg*; emphasis added).

The foregoing suggests that the more closely and objectively related an alleged mitigating circumstance is to a valid penological consideration, the stronger the argument for requiring that the sentencer be allowed to take that circumstance into account. The kind of factor which Penry asserts that the jury was not afforded an appropriate vehicle to give effect to is arguably quite remote from the recognized

purposes of punishment and justifications for the death sentence. While the retributive justification for the death penalty depends to some extent on the degree of the defendant's culpability, as well as on the nature and results of the offense, the Supreme Court's decisions indicate that culpability in this connection refers to the defendant's culpability as directly related to his participation in and state of mind respecting the particular offense in question. See *Enmund*, 102 S.Ct. at 3378; *Tison*, — U.S. —, 107 S.Ct. 1670, 1683, 1687, 95 L.Ed.2d 127. See also *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983). Such a determination, as well as that respecting rehabilitation potential, can be made with relative objectivity based on the evidence in a particular case. When the sentencer must go beyond that, as Pen-

* In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), the Court held it was not unconstitutional to grant the jury "absolute discretion" to impose or not to impose the death sentence on one committing murder in the first degree. *Id.* at 1456. Interestingly, in the companion case of *Crampton v. Ohio*, the Court noted, but suggested no error in, the instruction to the jury that it "must not be influenced by any consideration of sympathy." *Id.* at 1461. By the next year, during which Justices Harlan and Black departed the Court, *McGautha's* "absolute discretion" holding was substantially rendered a dead letter by *Furman*, as was confirmed four years later in *Gregg*, 96 S.Ct. at 2936 n. 47. This may reflect the rapidity, or perhaps the ambiguity, of "the evolving" of "standards of decency" referenced in Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), which had likewise proclaimed the constitutionality of capital punishment. *Id.* at 597-98. Now, a few years still later, has *McGautha* returned, though in the altered form of a mandatory requirement? To some extent, the answer, in light of the Court's post-*Gregg* opinions, must be "yes," but just to what extent is not fully clear.

ry would have it do, and must determine not only the accused's rehabilitation potential and his culpability on the occasion in question but also whether, in essence, he was at fault for being at fault, the decision-making process becomes vastly more subjective and necessarily involves speculation about wholly immeasurable abstractions such as free will and personal responsibility, as to which there is little of either common understanding or common agreement. As such, capital sentencing would also inevitably become far more unpredictable and unreviewable. Would it then, perhaps a few years later, again be subject to challenge on that ground? *

It is also questionable whether unlimited consideration of assertedly mitigating factors can be appropriately defended as a one-way street leading away from capital

Answering the latter question is particularly difficult in light of the fact that the Eighth Amendment's proscription of "cruel and unusual punishments" appears, from its text, context, and history, to be substantive, at least apart from whatever procedural connotations "unusual" may have. The latter may be consistent with the procedural approach of *Gregg* and of Justices Douglas, Stewart, and White in *Furman*. But the then unprecedented procedural reading of the Eighth Amendment given by *Lockett* thrusts entirely in the opposite direction. That the Court has since embraced such a *Lockett*-type procedural requirement as a component of its current Eighth Amendment jurisprudence cannot be doubted. Nor can it be doubted, however, that such a component is not only opposite from that of *Gregg* and the *Furman* three, but is also distinct from the traditional procedural due process approach exemplified, among the post-*Gregg* capital punishment cases, by decisions such as *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Thus, though we know that the *Lockett*-type procedural component exists, there are fewer of the normal guideposts by which to make a principled gauging of its limits and contours.

punishment. Such an argument is not responsive to the asserted desirability of minimizing arbitrariness and indiscriminacy. Moreover, it is doubtful that the street will really be one-way. The Court has held that a state may prove the nonexistence of potential mitigating circumstances, see *Barclay*, 103 S.Ct. 3418 at 3428, and where the range of potentially mitigating factors is almost unlimited what one sentencer may regard as mitigating another may view as aggravating.

Finally, even if, as now appears to be the case, the principles of the *Furman* plurality do not require a state to put any limits on the factors which the sentencer may determine to be mitigating, nevertheless this does not mean that a state has no voice in choosing the "substantive factors relevant to the penalty determination." *Ramos*, 103 S.Ct. at 3453. See also *id.* at 3452. While it is plain that whatever discretion a state may have in this respect does not extend to excluding from all con-

sideration the defendant's potential for rehabilitation, his lack of dangerousness, or the nature of his participation in or state of mind respecting the crime charged, nevertheless, it may be that a state has room to place some other limits on the sentencer's discretion, at least if those limits subserve valid penological purposes. Surely *Furman* teaches us that a valid penological purpose is fostering predictability, consistency, objectivity, rationality, and reviewability in capital sentencing. That purpose would seem to be fostered by not affording the jurors a vehicle by which to give decisive effect to the sort of considerations advanced by Penry, insofar only as the jurors may deem those considerations wholly irrelevant to either of the two Texas capital sentencing special issues.

Accordingly, while there is indeed a tension between *Jurek* and expressions in other recent decisions of the Court, it is by no means clear that *Jurek* has been or should be fatally undermined.

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION
APR 28 1986
MURRAY L. HARRIS, CLERK
By *[Signature]*
Deputy

JOHNNY PAUL PENRY
VS.
O. LANE MCCOTTER

NO. L-86-89-CA

ORDER DENYING FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS AND
DISSOLVING STAY OF EXECUTION

Petitioner was sentenced to death following his conviction for the offense of capital murder. The gruesome facts of his crime and the manner of his conviction were sufficiently discussed by the Court of Criminal Appeals of Texas upon their affirmance of the judgment. See Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 834 (1986). Petitioner was scheduled to be executed before sunrise on May 7, 1986.

He began this first pursuit of a writ of habeas corpus on April 10, 1986. The state trial court denied his application on April 27, and the Court of Criminal Appeals did likewise on the afternoon of May 5. Petitioner then filed the present application pursuant to 28 U.S.C. § 2254. On May 6, this Court stayed the execution in order to allow adequate time for the presentation and consideration of petitioner's constitutional claims.

APPENDIX B

ORDER DENYING FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS

In his amended petition, filed on May 22, petitioner raised fifteen grounds for relief. For present purposes, these fifteen grounds will be grouped into six broad categories related to the chronological stages of petitioner's trial. He asserts four potential errors which he alleges denied him a full and fair suppression hearing; five grounds of error which he contends demonstrate that his two confessions should have been excluded; one ground concerning the allegedly improper granting of seven of the state's challenges for cause during jury selection; two potential errors made during the trial; two objections made to the charge given at the punishment phase; and one final argument that his sentence constitutes cruel and unusual punishment because of his limited mental capacity. Each allegation will be discussed in the framework of the broader categories.

In reaching its decisions on these matters, the Court had before it the entire transcript of petitioner's trial, including copies of exhibits, as well as appellate briefs and the opinion affirming the conviction on direct appeal, and copies of the materials submitted to the state courts seeking habeas relief which were denied before resort to this Court. The Court reviewed all relevant portions of these materials. See Dillard v. Blackburn, 780 F.2d 509, 513 (5th Cir. 1986) (nothing requires a federal court to review a record in its entirety). The State does not contest the fact that petitioner has exhausted his state court remedies on the claims now before this Court. The parties have agreed and the Court concurs that the

present record covers all factual issues which may be raised in these proceedings, making it unnecessary to hold an evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 313; see also Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

After careful consideration of the relevant portions of the record and of the briefs and argument of counsel, the Court has determined that petitioner has failed to state any constitutional ground meriting relief. The Petition for a Writ of Habeas Corpus will be DENIED and the Stay of Execution DISSOLVED for the reasons which follow.

I. CRUEL AND UNUSUAL PUNISHMENT

Although last in a chronological sequence, petitioner's argument that his sentence constitutes cruel and unusual punishment deserves primary attention. It is grounded on the premise that a person who ostensibly thinks like a child should be treated like a child, and Texas does not execute children. Tex. Penal Code Ann. §8.07(d) (Vernon Supp. 1986) ("No person may, in any case, be punished by death for an offense committed while he was younger than 17 years.") In short, petitioner is asking for special consideration due to his limited mental capacity, and this request for special consideration permeates the remainder of his grounds for relief.

In challenging the constitutionality of a death sentence imposed upon a person of his mental ability, petitioner focuses on evidence bearing on his limited capacity. This evidence

indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition. The fact remains that he was convicted of a heinous crime and sentenced to death. The question now is whether society will accord any additional consideration to his condition when determining the punishment it metes out.

The answer is apparently a three-fold no. First, the Texas statute designed to prohibit execution of children has no

apparent application to adults with limited mental capacities. Second, while the Constitution requires that mental deficiencies be considered before imposing a sentence of death, it does not proscribe such a sentence for the mentally deficient. Third, the prohibition against execution of those unable to understand the reason for their punishment apparently does not apply to a person like Penry who has been adjudicated a competent man.

The Texas statute prohibiting execution of defendants who were younger than seventeen when they committed the offense speaks only of calendar age, not mental age. No Texas case has given the statute this broader meaning. See, e.g. Beck v. State, 648 S.W.2d 7, 9 (Tex. Cr. App. 1983); Cammon v. State, 672 S.W.2d 845, 851 (Tex. App. - Corpus Christi 1984, no pet.) (if under 17, life imprisonment is maximum penalty). Giving the statute this interpretation would open the floodgates in Texas courts to claims of "mental" age below seventeen in capital cases. Except for the minimal persuasive value of a Texas policy against executing children, this statute is of no help to petitioner.

Petitioner instead must rely on eighth amendment contentions of cruel and unusual punishment. To date the Supreme Court has not held that the execution of mentally retarded defendants constitutes cruel and unusual punishment, however. Instead, the Court has merely required that juries consider why the death penalty should not be imposed as well as why it should be imposed (mitigating as well as aggravating

factors). Jurek v. Texas, 428 U.S. 262, 271 (1976). Mental retardation is nothing more than one of the mitigating factors to be considered.

In Jurek, the Supreme Court upheld the facial validity of Texas' death penalty statute, finding that Texas apparently provided sufficient opportunities for the presentation and consideration of mitigating factors. Id. at 272; Brock v. McCotter, 781 F.2d 1152, 1157 n. 5 (5th Cir. 1986), cert. denied, 106 S.Ct. 2259 (1986) (Texas statute withstood challenge to its facial validity in Jurek and remains valid unless inconsistent with new Supreme Court case law). In this case, petitioner's mental capacity was considered by a jury in a competency hearing, at the guilt-innocence phase of the trial, and at the punishment phase of the trial. The jury was able to consider it as a possible mitigating factor at the punishment phase, thus satisfying constitutional requirements.

Finally, petitioner attempts to draw the Supreme Court's most recent pronouncement on insanity and punishment into this case. See Ford v. Wainwright, 106 S.Ct. 2595 (1986). Ford reaffirms prior law prohibiting the execution of the insane. Id. at 2602. In reciting the long history of this prohibition, the Court repeats a quotation from Blackstone indicating that lunatics and idiots should not be punished for their own acts if they were not truly aware of what they were doing. Id. at 2600.

Petitioner, however, does not qualify as an idiot in either the psychiatric or legal sense of that word. He was adjudicated

competent by a jury which heard substantial evidence concerning petitioner's mental capacity. Given the plethora of testimony on both sides of the issues, this Court cannot say that the finding of competency was not fairly supported by the record. See 28 U.S.C. § 2254(d)(8). As such, the finding of competency must be presumed correct. Maggio v. Fulford, 462 U.S. 111, 117 (1983); 28 U.S.C. § 2254(d).

This presumption has far-reaching implications in the present case. Most, if not all, of petitioner's grounds for relief are premised in part on his alleged incompetency or retardation. Petitioner contends, for example, that he could not have voluntarily waived his right to remain silent before he confessed, since his retardation made it impossible for him to say "no" to any authority figure. Petitioner may indeed be retarded, but his impairment is not so severe that he could not have knowingly and voluntarily waived his rights. He is legally competent.

Petitioner's request for habeas relief based on the allegedly cruel and unusual nature of his punishment is therefore DENIED.

II. THE SUPPRESSION HEARING

On February 29, 1980, the 258th District Court of Trinity County, Texas, heard petitioner's pre-trial motions to suppress evidence. Jackson v. Denno, 378 U.S. 368 (1984); R. Vol. 4 at 136-271. The hearing primarily centered on the suppression of State's Exhibits 4 and 6; two statements that petitioner gave to

investigating officers in which he confessed to the rape and murder of Pamela Carpenter. At the suppression hearing, State's witnesses included the two officers who initially questioned petitioner, Chief of Police Smith who took petitioner's first written statement, Texas Ranger Cook who took petitioner's second written statement, the four individuals who witnessed the petitioner's signature, and the justice of the peace before whom petitioner initially appeared.

Petitioner did not testify and offered as his only witness Police Officer Page, the first law enforcement officer to arrive at the scene of the crime. The judge heard argument from counsel for both sides.

The objections voiced by petitioner regarding the two statements embraced two different substantive protections. First, petitioner contended that the confessions were not voluntarily given to officers and, therefore, should be suppressed because their admission would violate his right to be free from compelled self-incrimination. U. S. Const. amend. V and XIV; Miranda v. Arizona, 384 U.S. 436 (1966). Second, petitioner argued that all statements were made following an illegal arrest and, therefore, should be excluded under the "fruit of the poisonous tree" doctrine. U. S. Const. amend. IV; Wong Sun v. United States, 371 U.S. 471 (1963).

The trial court denied the motions to suppress the two statements. Tr. 94-95; R. Vol. 4 at 270. Regarding voluntariness, the trial judge found that petitioner "was not

induced or caused by any person to give or make such written statement[s] by threats, persuasion, compulsion, intimidations, violence, promises, unlawful detention or anything else other than the free and voluntary act" of the petitioner, and therefore his conclusion that no constitutional rights were violated.

The trial judge also found that petitioner was taken before Justice of the Peace Galloway in Livingston, Texas, who warned petitioner that he was charged with capital murder and of the rights incorporated into Art. 15.17 of the Texas Code of Criminal Procedure on October 25, 1979, the day of his arrest. Further, he found that petitioner was warned by the officer to whom each statement was made of all the rights set forth in Art. 38.22 of the Texas Code of Criminal Procedure. The trial judge found that petitioner knowingly and voluntarily waived these rights.

The trial judge impliedly found that the petitioner was not under arrest when his first oral confession was made. R. Vol. 4 at 270. Petitioner was clearly under arrest when the two written statements were taken. R. Vol. 4 at 199.

Under 29 U.S.C. § 2254(d) a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply. Miller v. Fenton, 106 S.Ct. 445 (1985); 28 U.S.C. § 2254(d). The voluntariness of a confession is not a factual issue entitled to the § 2254(d) presumption of correctness, but

is a purely legal question subject to independent federal review. Id. at 451. In other words, the ultimate legal conclusion of whether under the totality of the circumstances petitioner's statement was the product of his free will or the product of circumstances overbearing his free will is not presumed to be correct, regardless of the § 2254(d) exceptions. When voluntariness is challenged on habeas corpus review it is subject to plenary federal determination. Id.; see also Brantley v. McKaskle, 722 F.2d 187 (5th Cir. 1983). However, this Court believes that there is fair support in the record for the underlying factual findings and is bound by the presumption of correctness of those findings made by the trial court, concerning the absence of threats, persuasion, compulsion, intimidation, violence, promises and unlawful detention. Miller, 106 S.Ct. at 453; 28 U.S.C. § 2254(d)(8).

Although the first four points in petitioner's application challenge aspects of the Jackson v. Denno hearing, it is clear to the Court that they do not directly challenge the legal conclusion that his confessions were not voluntary. Rather, they focus on alleged flaws in the state court proceeding which allegedly denied him a full and fair suppression hearing. In other words, petitioner has focused on the "historical" facts which support the legal conclusion that his confessions were given voluntarily. These historical facts are entitled to a presumption of correctness unless petitioner can persuade the

Court that one or more of his first four grounds, if true, did deny him a full and fair hearing.

It is at this point that some confusion exists. On the one hand, petitioner has stipulated that the record now before the Court is factually complete, and he agrees with the State that no evidentiary hearing is necessary. On the other hand, the grounds raised in his first four points would make another evidentiary hearing necessary in the state court, since such a hearing is the remedy available to petitioner if this Court finds his state hearing was not full or fair. Sigler v. Parker, 396 U.S. 482 (1970). Prevailing on one of these four points would destroy any presumption of correctness accorded to the historical facts, and would require an evidentiary hearing, but would not alone warrant vacating the state court judgment. It is with this understanding that the Court considered the initial four grounds of petitioner's application.

In these first four grounds for habeas corpus relief petitioner asserts that he was denied a full and fair suppression hearing because of: (1) the failure of the State to produce all statements made by petitioner to peace officers pursuant to the trial court's discovery order; (2) the failure of Billy Ray Nelson to testify truthfully at the suppression hearing; (3) the failure of the prosecutor to inform petitioner that he was the focus of the criminal investigation; and (4) the failure of the trial court to approve additional funds for an investigator to interview witnesses on petitioner's behalf.

a. Background

It is clear that petitioner has the constitutional right to have "a fair hearing and a reliable determination of the issue of voluntariness." Jackson v. Denno, 378 U.S. 368, 377 (1964), and that the guarantees of due process call for a "hearing appropriate to the nature of the case." United States v. Raddatz, 447 U.S. 667, 677 (1980) quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 327 (1937). In the sense of a federal habeas corpus proceeding alleging constitutional error in a state court suppression hearing, the federal district court should determine upon independent review that material facts were adequately developed and that petitioner had a "full, fair, and adequate opportunity to present all relevant facts at the suppression hearing." See e.g. Nix v. Williams, 104 S.Ct. 2501, 2512 (1984). It is through these flexible standards of due process that this Court must sift petitioner's claims of a denial of a full and fair suppression hearing. After a full review of the suppression hearing transcript, briefs, and applicable law the Court finds that petitioner's claims are without merit.

b. Confessions of Petitioner

Petitioner claims that he was denied his due process right to a full and fair suppression hearing because the prosecutor failed to disclose, pursuant to the trial court's discovery order, an oral statement made by petitioner in 1977 in which he confessed an unrelated rape to law enforcement officials.

Petitioner argues that this information constituted evidence relevant to his propensity to confess to a crime even if he was actually innocent. Further, petitioner contends that the failure to disclose this information constitutes a denial of due process, in the context of a suppression hearing, analagous to a prosecutor's failure to disclose exculpatory evidence admissible in the guilt or punishment phase. See Brady v. Maryland, 373 U.S. 83 (1963). The Court is not persuaded.

First, the record reflects that defense counsel were provided with a copy of State's Exhibit 6, petitioner's confession to the Carpenter rape-murder, which contained the substance of petitioner's confession to the prior unrelated rape. This document was before counsel and the trial court prior to and during the confession suppression hearing, and it was in fact the focus of the hearing. This remains true even assuming that petitioner neither informed counsel of his previous confession nor had the mental capacity to do so,¹ and that defense counsel failed to elicit the information on its own. Counsel was armed with the substance of that previous confession in petitioner's signed statement of

1

Petitioner contends that Penry's highest level of achievement was the ability to "prepare an egg" and perforce he was unable to provide this information to his defense counsel. This addresses the issue of competency. After a full and fair hearing a jury decided petitioner was competent to stand trial and assist in his defense. R. 7 at 944; Maggio v. Fulford, 462 U.S. 111, 117 (1983) (competency finding entitled to the presumption of correctness); see supra section I.

October 26, 1979, but did not present evidence or argue the "suggestibility" point in the Jackson v. Denno hearing. Therefore, the default of the State, if any, in failing to comply with the discovery order was not of the magnitude of a denial of due process.

Even absent these facts the Court is of the opinion that petitioner's initial ground is meritless. Petitioner contends the State's failure to disclose a prior unrelated confession deprived him of a full and fair suppression hearing because the undisclosed information was relevant to petitioner's propensity to confess to acts which he did not commit. He argues that under Brady, this failure to disclose information rendered the suppression hearing constitutionally infirm.

Brady stands for the proposition that the prosecutor's suppression of evidence favorable to an accused violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecutor. Brady, 373 U.S. at 87; Matheson v. King, 751 F.2d 1432 (5th Cir. 1985), cert. denied, 106 S.Ct. 1798 (1986). Petitioner's own argument negates his position on the Brady issue. The materiality of the prior statements, if any, goes to the issue of voluntariness, not guilt or punishment. Neither guilt nor punishment was before the trial court in the Jackson v. Denno pre-trial suppression hearing. This Court finds no reason or authority supporting petitioner's position for extrapolating the

protections of Brady to the pre-trial suppression hearing. Brady guarantees that a defendant will not be judged guilty without access to exculpatory evidence that the prosecutor has in his possession but that is unknown to the defendant. Having stated the rule, its inapplicability in this context cannot be more clearly demonstrated. The prior confession is neither exculpatory of the crime under investigation nor is it information unknown to the defendant. Petitioner's reliance on Brady and United States v. Agurs, 427 U.S. 97 (1976) (duty to disclose Brady material pursuant to a general request) is misplaced.

c. Testimony of Deputy Sheriff Nelson

Petitioner's second ground assaults the suppression hearing testimony of Deputy Sheriff Billy Ray Nelson. R. 4 at 136-159. Petitioner alleges that Nelson failed to testify to the whole truth at the suppression hearing and as a result left the false impression with the trial court that petitioner was not under arrest at the time of petitioner's first oral confession. Petitioner's sole basis for this claim is found in the alleged discrepancies in Nelson's testimony cited by petitioner. See R. Vol. 4 at 141 and 163, R. Vol. 14 at 1625-28 and 1621-22.

After an examination of the relevant testimony the Court finds no basis for an inference that Nelson testified falsely other than petitioner's conclusory allegations. To the extent that petitioner perceives discrepancy in the testimony offered by Nelson there are no allegations to raise a fact issue of whether the testimony was knowingly given falsely or that the

testimony was material to any decision rendered by the trial court. See e.g. Giglio v. United States, 405 U.S. 150 (1972); Williams v. Griswald, 743 F.2d 1533 (5th Cir. 1984). In light of the counsel's opportunity to attack Nelson's credibility by further cross-examination and the total record in the suppression hearing, the Court is unable to find that petitioner was denied a full and fair hearing based on the discrepancy of testimony, if any, by Nelson. Again, Petitioner's reliance on United States v. Agurs, 427 U.S. 97 (1976) is misplaced and this ground of relief is without merit.

d. Petitioner as the focus of the investigation

Petitioner states that at the suppression hearing "[t]he most important issue ... was when exactly petitioner was effectively under arrest." R. Vol. 12, at 1595-96. Petitioner argues that he was denied a full and fair hearing because District Attorney Price failed to disclose that after his initial encounter with petitioner his investigation had focused on petitioner and the prosecutor knew Penry would be on trial for the offense. Petitioner contends that this proves he was under arrest from the moment he first met with Price. This contention was decided adversely to petitioner by the trial court, R. Vol. 4 at 270, in the suppression hearing and subsequently affirmed by the Texas Court of Criminal Appeals. Penry, 691 S.W.2d 645-46. Even if it was true that petitioner was the focus of the criminal investigation, it is irrelevant to the question of whether he received a full and fair suppression

hearing. The trial court properly held a hearing to determine whether the acts of law enforcement officers in obtaining the petitioner's confession were in accordance with accepted constitutional limitations on criminal procedure. If their acts were found to be within constitutional bounds, the confessions would be admissible in the prosecution of this case. Of course, if they acted beyond the bounds of accepted constitutional law then the confessions must be excluded from evidence.

In addressing the precise issue raised as a ground for habeas corpus relief the question is not, as petitioner has framed it, whether criminal investigators acted within permissible constitutional standards, but whether the trial court afforded petitioner a full and fair opportunity to challenge the constitutionality of their conduct. From this perspective, it is irrelevant whether petitioner was in fact the focus of the investigation or whether he was informed of this fact. The trial court determined following a full and fair hearing consisting of testimony and argument of counsel that petitioner was not in custody when he made his first inculpatory statement to officers and that all oral and written statements were given freely and voluntarily. There is nothing in the record before the Court to indicate that petitioner was denied a full and fair opportunity to challenge official conduct with regard to his investigation.

e. Investigator expenses

Finally, petitioner contends that he was denied a full and fair suppression hearing because the trial court allowed only

\$500.00 for payment of investigation fees and denied petitioner's request for an amount of up to \$3,000.00. Tr. 33. See Tex. Code Crim. Proc. Ann. art. 26.05 (Vernon 1981). The Court is unable to find error of constitutional magnitude in the trial court's action. Tr. 63 & Tr. 7.

Petitioner argues that unspecified testimony was given at petitioner's trial and that this testimony was material to the issue of suppression and would have been discovered but for the denial of additional funds. These conclusory statements are unsupported by factual allegations, identification of the evidence, demonstration of its materiality, or a showing of prejudice to the petitioner. As such, they do not raise a constitutional issue. Mayberry v. Davis, 608 F.2d 1076 (5th Cir. 1979); Schlang v. Heard, 691 F.2d 796 (5th Cir. 1982).

Second, no record was made in the trial court of petitioner's particular need for the funds or the harm he would suffer by their denial. The investigator stated that he was aware of the listed witnesses, had seen the offense report, and was provided with copies of the witness' statements (with the exception of petitioner's family members). When asked about the scope of the investigation, his reply was to investigate whatever was asked of him. See R. Vol. 3 at 66-69. This Court cannot find an abuse of discretion under state standards, see e.g. Phillips v. State of Texas, 701 S.W.2d 875, 894-95 (Tex.

Cr. App. 1985), and more importantly cannot find an error that renders the hearing or trial so fundamentally unfair that rise to a due process violation, for which the writ will issue. Banzavechia v. Wainwright, 658 F.2d 337, 340 (5th Cir. 1981).

In conclusion, petitioner has not shown that an exception to the § 2254(d) presumption of correctness is applicable. Therefore, this Court would not be justified in disregarding the presumption of correction that clothes the trial court's findings on historical facts. Such a showing is a prerequisite to an evidentiary hearing in this Court or rehearing on the voluntariness issue in state court. Further, petitioner has alleged facts stemming from the pre-trial hearing that, if true, would establish that petitioner had been deprived of constitutional rights by use of an involuntary confession. Procunier v. Atchley, 400 U.S. 446, 454 (1971). Petitioner has not been denied due process when he has been given the opportunity to confront the state's witnesses with the aid of competent counsel, hear the State's evidence, present his own evidence, and to offer argument of the trial court in support of his position. The fundamental requisite of due process is an opportunity to be heard. Ford v. Wainwright, 106 S.Ct. 2595 (1986). The record fully supports the conclusions that the Jackson v. Denno hearing provided petitioner with that opportunity and that no constitutional error infected the proceeding.

III. CONFESSIONS

For the purposes of this application for habeas corpus, the relevant facts are as follows. 28 U.S.C. § 2254(d). On the morning of October 25, 1979, Billy Ray Nelson and Bob Grissom, deputies of the Polk County Sheriff's Department were on patrol in Livingston, Texas. At that time, they received a radio transmission from the department dispatcher concerning a stabbing and possible rape of a woman in Livingston. The radio report included a general description of the assailant.

Deputy Nelson knew that petitioner had recently been paroled from the Texas Department of Corrections on a rape conviction and knew that petitioner fit the description of the assailant. At that time, petitioner was living with his father in Livingston. Around 11:00 A.M., the deputies drove to the home of petitioner's father to determine if petitioner was there and if he knew anything about the crime. Upon finding him at home, the officers asked petitioner if he would accompany them to the police station to answer a few questions. Petitioner agreed to go with the men, but requested that he be allowed to put on a shirt first. The officers agreed and then drove petitioner to the police station.

Upon arrival, Officer Nelson noticed a blood stain soaking through the back of petitioner's shirt. Petitioner explained that he had been injured in a bicycle accident earlier in the day and displayed a puncture wound on his shoulder blade. Since the shirt petitioner was wearing did not have a hole in the back, Officer Nelson asked if he could see the shirt worn at the

time of the injury. Petitioner agreed and after Miranda warnings were read and waived petitioner signed a consent to search form for the shirt. The consent was given at 12:10 P.M. and witnessed by Ted Everitt, an investigator for the district attorney and Deputy Grissom.

Petitioner accompanied the men back to his father's house and retrieved a western-style shirt and undershirt for them. The shirts were marked with puncture holes corresponding to the wounds on petitioner's back.

At this time, the officers asked petitioner if he would be willing to accompany them to the scene of the crime. Petitioner agreed, and voluntarily accompanied them to the Carpenter home. Upon arrival at the scene, the patrol car was parked in front and petitioner remained in the back seat with the back door open. Deputies Nelson and Grissom were with him at times and, periodically, walked around the house and patrol car. The district attorney and his investigator were in the house.

After about forty-five minutes, petitioner voluntarily made the statement to the deputies that he wanted to talk and tell the truth. After being warned, petitioner made an oral confession to the officers of the attack on Pam Carpenter. Petitioner's statements were not induced by interrogation, threats, or coercion.

Deputy Nelson reported the statement to the district attorney and petitioner was brought into the Carpenter home where he was able to identify his pocket knife, the scissors

used to stab Pamela Carpenter, and the room in the house where the stabbing occurred. Petitioner was then taken to the Livingston Police Department and formally charged with capital murder. At approximately 2:45 P.M. petitioner was taken before Justice of the Peace Galloway in Livingston, given the magistrate's warning, and informed that he was charged with capital murder. During this appearance before Judge Galloway, petitioner's father was present and cautioned petitioner not sign waiver form. Petitioner's father then read petitioner his rights until he finally asked petitioner if he committed the crime. When petitioner responded affirmatively, his father left in anger.

Chief Smith then asked petitioner if he would be willing to give a statement, to which petitioner agreed. At about 3:25 P.M. petitioner was again warned and then proceeded to give an oral statement to Chief Smith. Chief Smith took down the statement and had it typed. The typed statement was read to petitioner in its entirety to make sure he understood it and had no questions. Two civilian witnesses were brought in off the street and again, the entire statement and warnings were read back to petitioner in the presence of the witnesses. Petitioner agreed that it was correct, made no changes when given the opportunity, then signed the document in the presence of the witnesses. This first statement confessed the crime of aggravated rape. Penry 691 S.W.2d at 642.

On October 26, 1979, a second statement was taken by Texas Ranger Maurice Cook. Petitioner was again warned of his rights prior to the statement. Cook not only read the warnings but explained them in detail to insure petitioner's understanding. After full explanation, Cook was satisfied that petitioner knew and understood his right to remain silent, to have a lawyer present during questioning, that he could have a lawyer appointed if he could not afford one, and the right to end the statement at any time. Petitioner then gave a more historically detailed oral statement, although the facts surrounding the rape and stabbing of Pamela Carpenter were relatively the same. The statement was typed from Ranger Cook's notes taken during petitioner's oral statement. The typed copy was then read to petitioner in its entirety in the presence of two civilian witnesses. At the conclusion, petitioner asked to make one handwritten addition to the statement which was done. Petitioner signed and initialled the document. At no time during the interrogation was petitioner subjected to threats, duress, promises of leniency, or any form of official coercion. At no time did he invoke his right to remain silent or express a desire to have a lawyer present or to terminate the interview. There is no evidence in the record that the second confession was taken merely for the purposes of enhancing punishment or securing the death penalty. The second written confession also constitutes an admission of aggravated rape. Penry, 641 S.W.2d at 642.

Petitioner filed a motion to suppress the two statements. After a full and fair pre-trial Jackson v. Denno hearing the trial court denied the motion to suppress and held the confessions admissible into evidence.

Petitioner argues that the trial court's decision to admit into evidence the statement made by petitioner to Chief Smith on October 25, 1979, and the statement made to Texas Ranger Cook on October 26, 1979, was unlawful for the following reasons: (1) the confessions were the fruit of an illegal arrest; (2) the officers did not use petitioner's exact words in writing the statements; and (3) both statements were made without petitioner's knowing relinquishment of the right to remain silent. Each argument is discussed briefly below.

1. Fruit of an illegal arrest

Petitioner contends that at the time of his initial oral confession to Deputies Nelson and Grissom that he was under arrest without probable cause. Petitioner premises this conclusion on the assumption that from the moment he left his father's house with the deputies he was under arrest. The state concedes probable cause for his arrest did not exist until he made the inculpatory statements in front of the Carpenter house. Therefore, the two confessions that followed the fourth amendment violation are "tainted fruit of the poisonous tree" and must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

The state contends that Stone v. Powell, 428 U.S. 465 (1976) controls and petitioner's fourth amendment claims are not reviewable in this Court on application for habeas corpus. Stone held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at this trial." Id. at 494 (footnotes omitted). See also Caver v. Alabama, 577 F.2d 1188, 1191-92 (5th Cir. 1978).

The trial court found, and the state concedes, that the petitioner was not under arrest prior to his initial oral confession. Even assuming that finding is incorrect, and that petitioner was under arrest illegally, does not change the fact that petitioner had a full and fair opportunity to litigate his fourth amendment claims in the trial court, R. Vol. 4 at 270-71, and on direct appeal. See Penry, 636 S.W.2d 645. Williams v. Brown, 609 F.2d 216-219-20 (5th Cir. 1980) (bar applies even if state court decided issue incorrectly.)

The trial court record fully supports the conclusion that the fourth amendment theory was raised before the trial judge, and that the Texas Court of Criminal Appeals considered and rejected this theory. Penry, 691 S.W.2d at 644 and 646. No factual allegations have been made that petitioner was denied a full and fair opportunity "to litigate a claim arising out of a putatively illegal search and seizure." Billiot v. Maggio, 694

F.2d 98 (5th Cir. 1982). Federal review on habeas corpus is thereby foreclosed. Wicker v. McCotter, 783 F.2d 487, 498 (5th Cir. 1986), cert. denied, 106 S.Ct. 3310 (1986); Billiot, 694 F.2d at 695.

2. Failure to use petitioner's exact words

Petitioner contends that his statements to Texas Ranger Cook and to Chief Smith should have been suppressed because neither Cook nor Smith used petitioner's exact words in writing the statement. The State argues that petitioner failed to object to the admission of the confessions on this specific ground and, therefore, has waived direct or collateral review for failure to comply with Texas contemporaneous objection rule. Alternatively, the State argues the record clearly supports the conclusion that the content of the statement was not altered by the officers taking down the statement.

Petitioner's response is that the contemporaneous objection rule was satisfied by the Motion to Suppress, Tr. 74, which states that "[a]ll statements of the Defendant ... were obtained illegally, in violation of Defendant's rights conferred by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution"

During the pre-trial Jackson v. Denno hearing, petitioner's counsel did not question Chief Smith about the exact wording of State's Exhibit 4, the October 25, 1979, statement. However, Maurice Cook was cross-examined about the wording of petitioner's second statement given on October 26, 1979. R. Vol. 4 at 227-28. The statements were admitted into evidence

for purposes of the suppression hearing without objection. R. Vol. 4 at 201, 237.

During the guilt phase of the trial the first statement, State's Exhibit 47, was admitted over the following defense objections: (1) renewal of all objections in the motion to suppress; (2) the statement does not comply with Tex. Code Crim. Proc., Ann. art. 38.22; (3) the statement was involuntary; (4) the statement was "fruit of the poisonous tree"; and (5) admission violates Miranda and Atwell v. United States, 398 F.2d 407 (5th Cir. 1968). No specific objection was raised concerning the exact wording of the statement. R. Vol. 15 at 1894 and 1867. All objections were overruled.

State's Exhibit 48-S, the second statement given by petitioner and taken by Ranger Cook, was admitted into evidence over the following objections: (1) the second statement was the fruit of a prior illegal statement; (2) the statement was involuntary; (3) the statement does not comply with Tex. Code Crim. Proc. Ann. art. 38.22; and (4) its admission into evidence violates Miranda and Atwell. All objections were overruled.

Finally, in the punishment phase State's Exhibit 48-S-2, a redacted version of the second statement, was admitted over the defendant's general objection that was "heretofore stated in the suppression hearing and main trial." R. Vol. XVII at 2603-2608.

The record is clear that defense counsel did not raise the specific objection that petitioner's statements were inadmissible because they were not verbatim transcriptions. Further, petitioner did not raise the issue as a ground of error

on direct appeal of his conviction, see Johnny Paul Penry v. State, Brief for Appellant, p. 2-5, but did so for the first time in his application for habeas corpus, Ex parte Johnny Paul Penry, Application for Writ of Habeas Corpus to the 258th Judicial District Court, p. 2.

Respondent now argues procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982). Because the state court did not specify whether habeas relief was denied on the merits or due to procedural default, this Court is left to make the determination from the stipulated record. See generally O'Bryan v. Estelle, 714 F.2d 365, 383-85 (5th Cir. 1983); Preston v. Maggio, 705 F.2d 113 (5th Cir. 1983).

In making that determination the district court is directed to consider

[w]hether the court has used procedural default in similar cases to preclude review of the claim's merits, whether the history of the case would suggest that the state court was aware of the procedural default, and whether the state court's opinions suggest reliance upon procedural grounds or a determination of the merits.

O'Bryan, 714 F.2d at 384 (quoting Preston).

The Texas cases reveal that "when the objection raised at trial is not the same as that urged on appeal, the complaint is not properly preserved for review." Guzmon v. State, 697 S.W.2d 404 (Tex. Cr. App. 1985) (citations omitted). Buxton v. State, 699 S.W.2d 212 (Tex. Cr. App. 1985), clearly states that if the error raised on appeal does not comport with the trial objection, no error was preserved. Id. at 217.

Second, this procedural error was clearly pointed out to the state court by respondents in their response to the application for habeas corpus. See Respondent's Original Answer to Petitioner's Application for Writ of Habeas Corpus to the 258th Judicial District Court, par. III(6). Therefore, it is reasonable to conclude that the state court was aware of the procedural default.

Petitioner offers no "cause" to excuse the failure to specifically object to the wording of the statements. He offers only that his Motion to Suppress raised all objections, therefore, no procedural default could follow. The Texas cases suggest to the contrary.

Based on the above discussion the Court is of the opinion that procedural default in the state courts, not justified by "cause" precludes review of the merits of petitioner's claim in this Court.

However, even absent procedural default, petitioner has not identified a single error or discrepancy attributable to the officers' conduct. His conclusory allegations and failure to state specific facts that, if true, would warrant habeas relief, do not properly raise a constitutional issue. Schlang, supra.

3. Right to remain silent

a. Miranda and Voluntariness

Petitioner contends, in grounds for relief 13 and 14, that his statements of October 25, 1979, to Chief Smith and October 26, 1979, to Ranger Cook should have been suppressed by the trial court because they were made without a knowing relinquishment of petitioner's right to remain silent in

violation of Miranda v. Arizona, 384 U.S. 436 (1966). However, a fair reading of the arguments supporting these grounds for relief requires this Court to address not only the issue of validity of the waiver of petitioners Miranda rights which are grounded in the Fifth Amendment and made applicable to the states through the fourteenth amendment, Malloy v. Hogan, 378 U.S. 1 (1964), but also the issue of the voluntariness of the confessions themselves under a fourteenth amendment due process analysis. In support of the former argument, petitioner relies on Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972); and in support of the latter he relies on Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 1001, 1014 (1981).

b. Miranda and the Two Confessions

The Supreme Court recently discussed the proper standard of review of a question concerning the validity of the waiver of a Miranda right in Moran v. Burbine:

Echoing the standard first articulated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), Miranda holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444, 475. The inquiry has two distinct dimensions. Edwards v. Arizona, supra, 451 U.S. at 482, Brewer v. Williams, 430 U.S. 387, 404 (1977). First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision of abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of

comprehension may a court properly conclude that the Miranda rights have been waived. Fare v. Michael C., 442 U.S. 707, 725 (1979). See also North Carolina v. Butler, 441 U.S. 369, 374-375 (1979)

106 S.Ct. 1135, 1141 (1986).

Applying the above standard to the present case, the Court has no difficulty in determining that petitioner received and waived multiple valid warnings during his brief detention prior to his two confessions and, further, that immediately prior to each confession, petitioner was warned and given explanations of the warnings and rights guaranteed him. The record reflects that prior to his first written statement, petitioner was warned no less than four times that he had a right to remain silent. Prior to the second confession, which was taken by Ranger Cook, petitioner was again given a complete set of warnings and an explanation of his rights.

Petitioner's waiver of his right to remain silent and concomitant decision to speak was voluntary in the sense that "it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Id. The evidentiary records from both the Jackson v. Denno hearing and the competency hearing are devoid of any evidence of overreaching by law enforcement to gain petitioner's confessions. See generally R. Vol. 4 at 136-271; R. Vol. 6 at 478-550. No evidence was ever offered that suggested petitioner was physically intimidated or psychologically coerced by the actions or techniques of his interrogatories, any representations or promises made by them or any other factor that would allow this Court to find that state coercion, rather than free choice,

prompted the confessions. Even petitioner's testimony negates any such inference. Petitioner affirmatively stated at his competency hearing that neither Chief Smith or Ranger Cook ever mistreated him or promised him anything. R. Vol. 6 at 534.

Second, the Court finds from the evidentiary record that petitioner's right to remain silent was waived with his awareness of his right and the consequence of the decision to abandon it. 106 S.Ct. at 1141. Petitioner testified that his rights were not only read but explained as well prior to his confessions. R. Vol. 6 at 535. This is consistent with the testimony of Chief Smith and Ranger Cook offered at the Jackson v. Denno hearing. He knew that he was charged with murder, R. Vol. 6 at 539, and what that meant. Contrary to petitioner's present contentions, the record demonstrates that he was aware of his right to remain silent in the face of questioning. Petitioner's testimony affirmed that Ranger Cook told him of his right to remain silent and added "what that means is you don't have to talk." R. Vol. 6 at 535.

Further, the record supports that with each set of warnings, petitioner was told that if he chose to talk, his statements could be used against him in a court of law. During the competency hearing, petitioner testified that he knew what that meant. Whether he understood the full extent the statements could be used and the possible ramifications of each use is not in this record. However, that level of understanding is not required to make a valid waiver of Miranda.

In Oregon v. Elstad, 105 S.Ct. 1285 (1985) the Supreme Court stated:

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. . . . Thus we have not held that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all the consequences flowing from the nature and quality of the evidence in the case.

Id. at 1297-98. It is sufficient in the opinion of this Court that petitioner knew and understood that as a consequence of abandoning his right to remain silent that statements made by him could be used to secure his conviction and punishment for the offenses charged. Miranda, 384 U.S. at 469.

After independent review of the evidentiary record, the Court is of the opinion the totality of the circumstances demonstrates both an uncoerced decision and an appreciation of its possible consequences by petitioner, and that he was competent to make such a choice. Therefore, the Court is not persuaded that the totality of the circumstances affecting petitioner produced a waiver of the right to remain silent that was involuntary.

c. Due process and the Two Confessions

The trial court determined after a full and fair Jackson v. Denno hearing that the confessions of October 25 and October 26 were made voluntarily. While the underlying factual findings that support that legal conclusion are entitled to a presumption of correctness, 28 U.S.C. § 2254(d), the ultimate conclusion of

"voluntariness" is subject to plenary review in the federal court. Miller v. Fenton, 106 S.Ct. 445, 450 (1986).

Petitioner contends that his confessions to Chief Smith and Ranger Cook were not voluntary for the following reasons: (1) petitioner was susceptible to pressure; (2) petitioner was not told that his confessions could be used by the State to seek the death penalty; (3) the statements are highly suspect because they were typed from the notes of the officers rather than verbatim transcriptions of petitioner's actual words; and (4) with respect to the second confession only, that it was taken "for prosecutorial purposes in their drive for the death penalty," because it elicited facts that made petitioner's conduct look more deliberate and likely to continue. See Petitioner's Amended Application for Writ of Habeas Corpus, pp. 44-45.

Prior to Miranda the voluntariness of a confession of a suspect was measured against the requirements of the Fourteenth Amendment Due Process Clause. Statements "obtained by techniques and methods offensive to due process," Haynes v. Washington, 373 U.S. 503, 515 (1963), or under circumstances in which the suspect clearly had no opportunity to exercise "a free and unconstrained will," id. at 514 were inadmissible. See Oregon v. Elstad, 105 S.Ct. 1285 (1985). Once past the Miranda issue, discussed supra, "the primary criterion of admissibility [remains] the 'old' due process voluntariness test." Elstad,

105 S.Ct. at 1293, quoting Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 877 (1981).

The Fifth Circuit in Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980), cert. denied, 450 U.S. 1001, 1014 (1981) held:

[I]n order to find [the defendant's] confession voluntary, we must conclude that he made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him.

More recently, the Supreme Court addressed the issues of free will, voluntariness and due process in Colorado v. Connelly, 55 U.S.L.W. 4043 (1986), and held that "absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." Id. at 4045. The Court went on to hold that "coercive police conduct is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of Due Process of the Fourteenth Amendment." Id. at 4046, and rejected the contention that mental or psychological pressures alone would invalidate an otherwise valid confession.

In this collateral proceeding, the burden of proving involuntariness rests with the habeas corpus applicant. See Jurek, 623 F.2d at 937; Bruce v. Estelle, 536 F.2d 1051, 1058-59 (5th Cir. 1976), cert. denied, 429 U.S. 1053 (1977). With regard to both confessions, the Court is of the opinion that after independent review of the record, the Jackson v. Denno hearing, the competency hearing, and totality of the

circumstances that petitioner has not demonstrated a denial of due process.

"The determination of voluntariness of a confession requires the Court to consider the 'totality of the circumstances - both the characteristics of the accused and the details of the interrogation.'" U. S. v. Gorden, 638 F.Supp. 1120 (W.D. La. 1986) quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

At the time, petitioner was a young and physically healthy man. It is conceded by the state that petitioner is a man of limited mental abilities. Both his lack of education, Payne v. Arkansas, 356 U.S. 560 (1958), and low intelligence, Fikes v. Alabama, 352 U.S. 191 (1957) are characteristics that must be considered in this case. The record reflects that law enforcement officials that dealt with petitioner were aware of his limited capabilities, but rather than exploit his deficiencies, attempted to compensate for them. No evidence was offered that interrogators exploited petitioner's limited mental abilities to deceive petitioner, minimize his crime, or break his psychological resistance with unreasonable or improper interrogation techniques or surroundings. All evidence points to the contrary.

Second, there is no evidence that petitioner's immediate environment generated a psychological coercion to bend or break his will to resist interrogation. There has been no allegation that the time, place, or manner of questioning was inherently coercive. Both confessions were taken within a span of two

days. Petitioner spoke with and was cautioned by his father at the appearance before Justice of the Peace Galloway. Petitioner never requested the assistance of a lawyer. The questioning sessions were not unduly long, and the evidence tended to show they were interrupted rather than continuous.

The Elstad decision concedes that criminal suspects may be susceptible to various pressures that may ultimately yield a confession. But if the source of the coercion or pressure calculated to break the suspect's will does not emanate from law enforcement, then no Fourteenth Amendment rights have not been abridged. Id. at 1291. In other words, if a confession flows merely from a suspect's choice to tell the truth, to clear his conscience or even to minimize his culpability, due process is not offended.

Petitioner's next point is that he could not have made a voluntary confession without knowledge that the State could use the information to seek the death penalty. Miranda makes clear that the warning of a defendant of his constitutional right to remain silent serves two purposes. First, the warning is given to inform a possibly unknowing person of his right and to assure him that it will be honored. Second, the warning must be followed with an explanation that "anything said can and will be used against the individual in court." Miranda, 384 U.S. at 469. This admonition is not given to advise the suspect of the possible range of fines and penalties he may suffer upon a subsequent conviction, but rather is to bring home to a suspect an awareness of the consequence of speaking and that "he is

faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest." Id.

As noted previously, the Supreme Court "... has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." 105 S.Ct. at 1297; or "that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all the consequences flowing from the nature and quality of the evidence in the case." 105 S.Ct. 1297-98. Although spoken in the context of Miranda waiver, it is equally applicable here. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the Miranda waiver context than in the Fourteenth Amendment context." Connelly, 55 U.S.L.W. at 4047.

In Connelly, Justice Stevens concluded that where defendant was incompetent to stand trial he was not competent to waive his right to remain silent. Id. 4047-48 (Stevens, J. concurring in part and dissenting in part). Accepting his premise, then surely the converse must follow, that where an accused is found competent to stand trial, he must at a minimum have the capability to waive a constitutional right, even though an actual finding of waiver requires evaluation of additional circumstances. Justice Stevens continues, "the mere absence of police misconduct does not establish that the suspect has made a free and deliberate choice when the suspect is not competent to stand trial." Id. at 4048 n. 5. In this case, where a jury has

found petitioner competent plus the absence of any evidence of police misconduct strengthens this Court's conviction that the right to remain silent was validly waived. See Reddix v. Thigpen, 805 F.2d 506, 516 (5th Cir. 1986).

Finally, petitioner contends that the October 26 confession was involuntary because it was taken as part of a prosecutorial drive for the death penalty. Even if that allegation, though factually unsupported in the record, were true, an improper prosecutorial motivation alone would be insufficient to vitiate the voluntariness of petitioner's consent, but would merely be a factor to be considered when evaluating the impact of the totality of the circumstances on petitioner's exercise of free will. See Jurek, 623 F.2d at 941, n. 7 (the totality of factors relevant to the disposition of Jurek case).

In this case, the Court finds the existence of a second confession to be of minimal probative value on the issue of voluntariness. First, the undisputed evidence is that the second confession was taken by Ranger Cook without having read petitioner's initial confession and with minimal briefing from District Attorney Price. Price testified that he did not suggest specific areas of interrogation for Cook to develop. Second, the testimony was not controverted that the confession of October 26 was taken to develop the case factually with new information. Third, as distinguished from Jurek, the initial confession in this case was sufficient to allow prosecutors to seek the death penalty. This case differs vastly from Jurek, supra, where prosecutors acted essentially on a prosecutorial

"hunch" to take another confession and extract statements that would turn a murder case into a capital murder case. Fourth, there is fair support in the record that petitioner was mentally capable of making the statements. 28 U.S.C. § 2254(d)(8). Finally, there is no evidence in this record to raise the issue that prosecutors relied upon petitioner's suggestibility by pursuing a specific object during their interrogation and relenting only when they attained a confession to capital murder. Evidence of this character would be probative of official overreaching designed to overbear petitioner's free will and probative of involuntariness. But, other than petitioner's conclusory allegations of prosecutorial misconduct, there is no such evidence in the record and none before this Court. The absence of improper motivation by officers supports this Court's conclusion that under the totality of the circumstances these confessions cannot be deemed involuntary. Petitioner's arguments to the contrary are not persuasive.

IV. JURY VOIR DIRE

Petitioner argues that his jury was conviction prone because seven of the state's challenges for cause were granted by the Court, thus excluding people opposed to the death penalty. The former Witherspoon rule allowed trial courts to excuse jurors so opposed to the death penalty that they would automatically vote against such a sentence. Witherspoon v. Illinois, 391 U.S. 510 (1968). This rule was modified by the Supreme Court in 1985. See Wainwright v. Witt, 105 S.Ct. 844

(1985). Before constitutionally excusing jurors challenged for cause on Witherspoon grounds, trial courts now must be satisfied that the prospective juror's views concerning capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 852. A trial court's granting of a challenge for cause on this ground is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Darden v. Wainwright, 106 S.Ct. 2464, 2469 (1986) (citing Witt).

Petitioner concedes that six of the seven jurors excused for cause in this case admitted they could not vote for the death sentence, meaning they qualified for exclusion even under the narrower Witherspoon test. See R. Vol. 7 at 200-215 (Edna R. Williams); Vol. 9 at 488-499 (Priscilla Smith); Vol. 9 at 587-595 (Mrs. Buford Mills); Vol. 11 at 970-976 (Battie Deason); Vol. 11 at 997-1000 (Billie Jones); and Vol. 11 at 1050-1071 (Ernestine Lee). The seventh was excused after testifying that he would be unable to answer a question asking about petitioner's future behavior, since no one can say what a person might do in the future. See R. Vol. 11 at 888-913, 897 (Elmer Thompson). This is one of the three questions jurors must answer during the sentencing phase of a capital case in Texas.

Neither Witherspoon nor Witt seem to apply to Elmer Thompson because he was not excused because of his views on capital punishment, but because of his views on the uncertain nature of the future. By the same token, petitioner is unable

to demonstrate any error which resulted from Elmer Thompson's dismissal, other than a possible argument that the jury was made more conviction prone in his absence, and in the absence of the other six excused jurors.

The conviction prone theory has been squarely rejected by the Supreme Court, however. Lockhart v. McCree, 106 S.Ct. 1758 (1986). The sixth amendment guarantees defendants a right to a jury that will "conscientiously apply the law and finds the facts." Id. at 1767, citing Witt, 105 S.Ct. at 852. As long as this requirement is met, the state may "death qualify" juries in capital cases according to the standard set out in Witt.

Welcome v. Blackburn, 793 F.2d 672 (5th Cir. 1986).

Even assuming petitioner's conviction prone jury argument had not been rejected, no error exists. Petitioner failed to object to the challenges for cause at trial, and has failed to show cause for his failure and prejudice resulting from the trial court's action. Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-7 (1977). In addition, the state had six peremptory challenges which it did not use, meaning only one of the seven jurors need have been excused properly. In fact, all were properly excused, and petitioner's challenge to the jury fails to state an adequate ground for relief. This contention is therefore DENIED.

V. ALLEGED TRIAL ERRORS

Petitioner raises two grounds for relief related to activities at his trial. First, he alleges that the trial

court's failure to sua sponte order a Computerized Axial Tomography (CAT) Scan of petitioner's brain constituted a denial of equal protection. Second, he asserts that the trial court should have declared a mistrial when, during the punishment phase, a witness called to testify concerning a prior rape attempt failed to identify petitioner as the culprit.

The first allegation presents a novel argument. A psychiatrist called by petitioner on the issue of insanity testified that a CAT Scan would enable a doctor to determine whether petitioner had suffered any organic brain damage as a child which resulted in retardation. R. Vol. 16 at 2201. It is undisputed that defense counsel made no request for these tests to be performed. Petitioner cites authority for the proposition that competency to stand trial is a continuing issue, and insanity should be treated in the same manner. See Pride v. Estelle, 649 F.2d 324 (5th Cir. 1981). Petitioner concludes that it was incumbent upon the trial court to order further tests which could have helped decide the issue of petitioner's sanity, and his failure to do so constituted unlawful differential treatment of potentially insane defendants as opposed to potentially incompetent defendants.

The Pride case does not address the duties of trial courts to order testing on their own motion, however. Rather, it requires a federal habeas petitioner to prove by clear and convincing evidence facts which positively, unequivocally and clearly generate a real, substantial and legitimate doubt

concerning petitioner's competency to stand trial. Id. at 326; Johnson v. Estelle, 704 F.2d 232, 237-8 (5th Cir. 1983). Assuming petitioner is correct in asserting that this standard should be applied equally to insanity defenses, the burden has not been satisfied.

The record reflects a lengthy competency hearing and subsequent trial. The issue of insanity was raised at both. A jury heard extensive testimony from both sides concerning the possibility of organic brain damage. The jury rejected it as a factor precluding competency to stand trial, and later rejected it as a factor supporting an insanity defense. After examining the record, this Court believes these conclusions are fairly supported and as such should not be disturbed. Maggio v. Fulford, 462 U.S. 111, 117 (1983).

As a practical matter, imposing a burden upon a trial court to order testing based on a mere mention by a witness, without more, would create intolerable and unwieldy delays. This is especially true in light of all the facts in this case. For example, there was testimony from a psychologist indicating that brain scans were still in a developmental state at the time of this trial. R. Vol. 7 at 802. Testimony at the competency hearing from a clinical psychologist called on petitioner's behalf indicated that any organic brain damage petitioner may have suffered took the form of underdevelopment, and could not be detected by any test, including a brain scan. R. Vol. 6 at 589-590. In this case, the trial judge had no duty to order on

his own motion an unproven and probably ineffective test which would have added nothing to the issue of petitioner's sanity.

Even assuming the strict Pride standard is inapplicable to proof of an insanity defense, this Court can intervene only if the State failed to provide petitioner "access to the raw materials integral to the building of an effective defense." Ake v. Oklahoma, 105 S.Ct. 1087, 1094 (1985). In applying this standard, Ake required the appointment of a psychiatrist to assist in the preparation of a potential insanity defense. Ample professional assistance, including a psychiatrist, was provided to this petitioner. Given the multitude of tests performed over a period of years and prior to the trial, and the number of doctors who have examined petitioner, this Court is wholly unpersuaded that the failure to perform an unrequested CAT Scan deprived petitioner of the essential tools with which to build his defense.

Petitioner's second complaint in this category concerns the testimony of Julia Armitage, the victim of an attempted rape in 1976. Petitioner contends that since she could not positively identify him as her assailant, her testimony during the punishment phase was so prejudicial that it constituted fundamental error.² Petitioner apparently advances this

² Petitioner cites U.S. v. Garber, 471 F.2d. 212, 217 (5th Cir. 1972) to support his argument that no request for instruction was necessary in this case. Garber applied this standard, however, only in the context of fundamental or plain error as contemplated by Rule 52(b) of the Fed. Rules of Cr. Procedure.

argument in order to circumvent the Texas Court of Criminal Appeals' refusal to consider this point because the error was not properly preserved. See Penry, 691 S.W.2d 649-650.

Use of the fundamental error standard has been significantly restricted, however, and is available only in exceptional circumstances when necessary to avoid a miscarriage of justice. See, e.g., United States v. Frady, 456 U.S. 152, 163 (1972). For this reason, the fundamental error standard is inappropriate on collateral review of a criminal conviction which has been affirmed on direct appeal. Id. at 164. Petitioner must meet an even higher standard, which he has not done on this point.

Since resort to a fundamental error standard is not possible, this Court is left with the state court's finding that error was not properly preserved. Federal courts do not sit to review interpretations of state criminal law by the state's highest court. Seaton v. Procunier, 750 F.2d 366, 368 (5th Cir. 1985), cert. denied, 106 S.Ct. 110 (1986). It is not this Court's function to disagree with the Court of Criminal Appeals and hold that error was properly preserved.

The effect of this is to change the standard to be used in resolving petitioner's claim. Since the state courts have determined that the manner of objection was insufficient,

petitioner must show cause for the insufficiency and prejudice from Armitage's testimony. Engle, 456 U.S. at 107.

No explanation is offered to show cause. By the same token, it is unlikely that any prejudice resulted. A confession from petitioner describing a rape attempt similar in many respects to Armitage's ordeal was admitted after her testimony. R. Vol. 17 at 2640-41. Petitioner's trial counsel made it very clear to the jury when cross-examining Armitage that she could not positively identify petitioner as her assailant. R. Vol. 17 at 2616, 2617. The jury therefore knew Penry may or may not have been the assailant, but also knew Penry had been the assailant in a similar crime at the same time in the same area. Finally, the Armitage testimony was only a small part of the proceedings during the punishment phase of petitioner's trial. Given all these factors, it is extremely unlikely that Armitage's testimony played a decisive role in the proceedings, meaning it could not have infected the entire trial with "error of constitutional dimensions" nor could refusal to consider it result in a "fundamental miscarriage of justice." Frady, 456 U.S. at 170, 172. Both grounds for relief asserted by petitioner based on alleged trial errors will be overruled.

VI. PUNISHMENT PHASE JURY CHARGE

Petitioner next contends that his sentence constitutes cruel and unusual punishment because of the trial court's failure to instruct the jury on how to weigh mitigating factors when answering the three issues submitted to them at the

punishment phase of a capital case. See Tex. Code Crim. Proc. Part. 37.071(b(1)-(3)) (Vernon Supp. 1986) (Pet. No. 8).

Petitioner advances the same argument with regard to the trial court's refusal to define "deliberately" as used in the first of these three issues. (Pet. No. 9).

Both arguments have been "squarely foreclosed." Evans v. McCotter, 790 F.2d 1232, 1243 (5th Cir. 1986). Texas trial courts need not specifically instruct jurors on how to balance mitigating and aggravating circumstances. Esquivel v. McCotter, 777 F.2d 956, 958 (5th Cir. 1985), cert. denied, 106 S.Ct. 1662 (1986); citing Zant v. Stephens, 462 U.S. 862 (1983). By the same token, Texas trial courts need not define the term

"deliberately" as used in the punishment phase charge. Cannon v. State, 691 S.W.2d 564, 578 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 897 (1986); Russell v. State, 565 S.W.2d 771, 780 (Tex. Crim. App. 1983), cert. denied, 104 S.Ct. 1428 (1984).

In lieu of instructions, juries are allowed to use the common meanings attributed to words in the charge. Both prosecution and defense are free to argue the inferences they wish the jury to draw from the words used. See, e.g., Milton v. Procunier, 744 F.2d 1091, 1086 (5th Cir. 1984), cert. denied, 105 S.Ct. 2040 (1985). These two grounds of error will also be overruled.

CONCLUSION

The criminal courts of the State of Texas have convicted Johnny Paul Penry of capital murder and sentenced him to death. The duty of this federal court undertaking collateral review of

those decisions is to correct errors of constitutional magnitude, whether transgressions of enumerated rights or acts repugnant to fundamental principles of fairness and justness protected by the Due Process Clause of the fourteenth amendment. Ever mindful of that duty, petitioner's grounds for relief have been fully considered by the Court and, for the reasons stated above, rejected. It is therefore

ORDERED that Petitioner's First Amended Application for Writ of Habeas Corpus be, in all respects, DENIED. It is further

ORDERED that the Stay of Execution imposed by this Court on May 6, 1986, pending review of the petitioner's application is hereby DISSOLVED.

SIGNED this 25th day of April, 1987.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2466

JOHNNY PAUL PENRY,

Petitioner-Appellant, **U.S. COURT OF APPEALS
FILED**

versus

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

DEC 23 1987
GILBERT F. GANUCHEAU
CLERK

Respondent-Appellee.

Appeal from the United States District Court for
the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(December 23, 1987)

Before REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

NOTICE
FILED FOR LOCAL
COURT FOR STAY OF THE
JUDGMENT

APPENDIX C

ORDER DENYING SUGGESTION
FOR REHEARING EN BANC



(5)

No. 87-4177

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHNNY PAUL PENRY,
Petitioner

v.

JAMES A. LYNAUGH,
DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

CURTIS C. MASON
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 298-8371 Ext. 1370
Counsel for Petitioner

CHARLES A. PALMER
Assistant Attorney General of Texas
P.O. Box 12648, Capitol Station
Austin, Texas 78711
(512) 463-2080
Counsel for Respondent

TABLE OF CONTENTS

	Page
Relevant docket entries	1
Defendant's Notice of Intention to Raise Evidence of Insanity Defense	2
Motion Challenging Prospective Juror's Oath Specified in Sec. 12.31 (b) T.P.C.	3
Defendant's Motion for Pre-Trial Hearing to Deter- mine The Defendant's Competency to Stand Trial	5
Motion Requesting Appointment of Psychiatrist	7
Order Appointing Psychiatrist to Examine Defendant..	12
Jose G. Garcia, Letter Report on Psychiatric Exam- ination	13
Jose G. Garcia, Letter Report on Psychiatric Exam- ination	19
Charge to the Jury on Competency	20
Charge to Jury on Punishment	25
Testimony of Jerome B. Brown	30
Direct by Mr. Wright	30
Cross by Mr. Price	49
Re-Direct by Mr. Wright	70
Re-Cross by Mr. Price	72
Re-Direct by Mr. Wright	74
Re-Cross by Mr. Price	75
Re-Direct by Mr. Wright	77
Testimony of Jose G. Garcia	78
Direct by Mr. Wright	78
Cross by Mr. Price	104
Testimony of Shirley Finlayson	106
Direct by Mr. Wright	106
Cross by Mr. Price	115
Re-Direct by Mr. Wright	122

TABLE OF CONTENTS—Continued

	Page
Testimony by Trudy Penry	123
Direct by Mr. Wright	124
Cross by Mr. Price	129
Testimony of Patay Ross	131
Direct by Mr. Wright	131
Cross by Mr. Price	137
Testimony of Kenneth Vogtsberger	138
Direct by Mr. Keeshan	138
Cross by Mr. Wright	152
Re-Direct by Mr. Keeshan	158
Re-Cross by Mr. Wright	160
Re-Direct by Mr. Keeshan	163
Re-Cross by Mr. Wright	164
Re-Direct by Mr. Keeshan	165
Re-Cross by Mr. Wright	165
Testimony of Felix Peebles, Jr.	165
Direct by Mr. Price	166
Cross by Mr. Wright	174
Cross by Mr. Newman	176
Testimony of Jose G. Garcia	180
Direct by Mr. Wright	180
Cross by Mr. Price	185
Re-Direct by Mr. Wright	188
Re-Cross by Mr. Price	189
Re-Direct by Mr. Wright	192
Re-Cross by Mr. Price	193
Re-Direct by Mr. Wright	194
Re-Cross by Mr. Price	194

TABLE OF CONTENTS—Continued

	Page
Testimony of Felix Peebles, Jr.	195
Direct by Mr. Price	195
Cross by Mr. Wright	200
Re-Direct by Mr. Price	201
Re-Cross by Mr. Wright	203
Re-Direct by Mr. Price	204
Re-Cross by Mr. Newman	205
Testimony of Kenneth Vogtsberger	206
Direct by Mr. Price	207
Cross by Mr. Wright	208
Objection to Charge on Punishment	210
State's Opening Argument by Mr. Keeshan	213
Defendant's Opening Argument by Mr. Wright	217
Defendant's Closing Argument by Mr. Newman	222
State's Closing Argument by Mr. Price	225
Verdict of Jury	231
Order Denying First Amended Petition for Writ of Habeas Corpus and Dissolving Stay of Execution	234
Judgment of United States District Court, Eastern District of Texas, Lufkin Division	274
Certificate of Probable Cause	275
Deposition on Written Questions	276
AAMD Resolution on Capital Punishment	280
AAMD Press Release	281
Table a, Should Retarded be Subject to Death	283
Opinion of the United States Court of Appeals For the Fifth Circuit, Penry v. Lynaugh, 832 F.2d 915	284
Order Denying Suggestion for Rehearing En Banc	320
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis June 30, 1988	321

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Nov. 7, 1979	Indictment by Polk County Grand Jury for Capital Murder
Feb. 7, 1980	Order granting Change of Venue to Trinity County, Texas
Mar. 13, 1980	Defendant found competent to stand trial
Mar. 24, 1980	Jury sworn and trial on guilty or innocent begins
Apr. 1, 1980	Jury found defendant guilty of Capital Murder
Apr. 2, 1980	Jury returned verdict of yes to the three special issues
Apr. 18, 1980	Defendant sentenced and ordered committed to TDC pending Automatic Appeal
May 1, 1985	Texas Court of Criminal Appeals affirmed Penry's conviction on direct appeal
Jan. 13, 1986	U.S. Supreme Court denied Petition for Writ of Certiorari from direct appeal
Apr. 10, 1986	Petition for Writ of Habeas Corpus mailed to Trinity County, Texas District Clerk
May 5, 1986	Petition for Writ of Habeas Corpus denied by Texas Court of Criminal Appeals
May 5, 1986	Petition for Writ of Habeas Corpus filed in United States District Court, Eastern District of Texas, Lufkin Division
May 6, 1986	Stay of Execution granted

IN THE DISTRICT COURT
OF POLK COUNTY, TEXAS
258TH JUDICIAL DISTRICT

No. 10,222

THE STATE OF TEXAS

vs.

JOHNNY PAUL PENRY

Filed February 20, 1980

**DEFENDANT'S NOTICE OF INTENTION
TO RAISE EVIDENCE OF INSANITY DEFENSE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, by and through his counsel of record, and would respectfully show the Court as follows:

I.

That the Defendant hereby gives written notice to the Court and to the prosecuting attorney of his intention to offer evidence of the insanity defense at the trial on the merits of this cause, if the trial of this cause becomes necessary.

Respectfully submitted,

/s/ John E. Wright
JOHN E. WRIGHT
1021 Twelfth Street
Huntsville, Texas 77340
713/291-2211
Counsel for Defendant

(Certificate of Service Omitted in Printing)

IN THE DISTRICT COURT
OF POLK COUNTY, TEXAS
258TH JUDICIAL DISTRICT

(Title Omitted in Printing)

**MOTION CHALLENGING PROSPECTIVE
JUROR'S OATH SPECIFIED IN SEC. 12.31(b) T.P.C.**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant, Johnny Paul Penry, who respectively challenges as unconstitutional the oath required under Sec. 12.31(b), T.P.C., and would respectfully show as grounds therefore:

I.

That to "disqualify" any prospective juror "... unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact", has effect of denying defendant a representative jury guaranteed under the Sixth Amendment to the U.S. Constitution and Art. 1 Sections 10 and 15 of the Texas Constitution and Art. 36.29, T.C.Cr.P. and Defendant's right to due process and fundamental fairness guaranteed under the Fifth Amendment to the U.S. Constitution as well as Art. 1 Section 19 of the Texas Constitution.

II.

That the appropriate inquiry would be whether in spite of any opinion or scruple the prospective juror may have with regard to the mandatory punishment of death or imprisonment for life, the prospective juror would be

able to follow the law and impartially decide the fact issues.

WHEREFORE, Defendant would respectfully pray that this Honorable Court declare the disqualifying oath required by Section 12.32(b), T.P.C., and that said oath not be administered, but rather that each prospective juror be qualified as to the mandatory penalty only as to whether he could follow such law and impartially decide the facts.

Respectfully submitted,

/s/ John E. Wright
JOHN E. WRIGHT
Attorney for Defendant

(Certificate of Service Omitted in Printing)

ORDER

On this 29 day of February, 1980, came on to be considered Defendant's Motion Challenging Prospective Juror's Oath and said Motion is hereby (DENIED).

/s/ Joe Ned Dean
Judge Presiding

IN THE DISTRICT COURT OF POLK COUNTY, TEXAS 258TH JUDICIAL DISTRICT

(Title Omitted in Printing)

DEFENDANT'S MOTION FOR PRE-TRIAL HEARING TO DETERMINE THE DEFENDANT'S COMPETENCY TO STAND TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, by and through his counsel of record, and respectfully shows the Court as follows:

I.

That the Defendant is a person presently incompetent to stand trial, as the Defendant does not have sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and does not have a rational or factual understanding of the proceedings against him.

II.

That the Defendant is suffering from and is being treated for mental disease such as to render him presently incompetent to stand trial for the offense charged.

III.

That the undersigned counsel has now been advised by competent mental health care practitioners that the Defendant is probably suffering from and has been suffering from mental defect and psychotic illness and is probably in need of continuous treatment and hospitalization.

IV.

That for the foregoing reasons it is necessary that a preliminary hearing prior to trial on the merits be held to determine whether the Defendant is competent to stand trial.

WHEREFORE, PREMISES CONSIDERED, the Defendant, by and through his counsel of record, respectfully prays that this Honorable Court set this matter down for a hearing in order to determine whether the Defendant is competent to stand trial, and in the event the jury finds the Defendant incompetent to stand trial, that this Court enter an appropriate order providing for the proper and adequate hospitalization and treatment of the Defendant.

Respectfully submitted,

/s/ John E. Wright
JOHN E. WRIGHT
Attorney for Defendant

(Certificate of Service Omitted in Printing)

IN THE DISTRICT COURT OF
TRINITY COUNTY, TEXAS
258TH JUDICIAL DISTRICT

—
No. 6572

THE STATE OF TEXAS

vs.

JOHNNY PAUL PENRY

—
MOTION REQUESTING APPOINTMENT
OF PSYCHIATRIST

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas, acting by and through its Assistant District Attorney, in the above entitled and numbered cause, and respectfully moves that this Court, pursuant to Art. 46.02, Sections 3(a) and 3(b), C.C.P., appoint a disinterested qualified psychiatrist to examine the Defendant with regard to his present competency to stand trial and as to his sanity at the time of the offense.

The State of Texas further respectfully moves that the Court order that the above mentioned examination be conducted outside the presence of Defendant's attorneys, John Wright and Joe Newman, or any other person.

As good cause for this Motion, the State would respectfully show the Court the following: There is no constitutionally protected right for an accused to be represented by counsel or have counsel present during a psychiatric interview, and in support thereof would respect-

fully submit "Attachment A" for the Court's consideration.

WHEREFORE, PREMISES CONSIDERED, the State prays that this Motion be granted.

JOE L. PRICE
District Attorney
Trinity County, Texas

By: /s/ Travis E. Kitchens, Jr.
TRAVIS E. KITCHENS, JR.
Assistant District Attorney

(Certificate of Service Omitted in Printing)

TESTIMONY OF A PSYCHIATRIST EMPLOYED BY THE DISTRICT ATTORNEY

The lead Texas case which appears to fully discuss the issue of pre-trial examinations in anticipation of the defense of insanity is *Gephart v. State*, 249 S.W.2d 612 (Tex. Cr. App., 1952). In *Gephart*, "it came to the attention of the district attorney on September 27, 1950, that the defense of insanity would probably be interposed; and pursuant to this information, the district attorney in preparation for trial in the instant case, made arrangements to have appellant examined by these two psychiatrists. On September 30, 1950, appellant, while in the custody of the sheriff, was so examined without an order of the court and without having been given the statutory warning."

The Court of Criminal Appeals, after noting "a divergence of opinion on the question" in other jurisdictions, continued: "After analyzing our former holdings, we align ourselves with the jurisdictions which hold, in cases where insanity is a defense, that physicians or psychiatrists, at the instance of the prosecution or the court, may be allowed to make an examination of the accused in jail and then give as evidence their opinion or conclusions as to his mental condition." (Citations omitted, emphasis supplied.)

This was, of course, a pre-*United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) case. However, in *Stultz v. State*, 500 S.W.2d 853 (Tex. Cr. App., 1973) the court ruled that *Wade* did not require the presence of counsel at a psychiatric examination, referring to its holding in *Blankenship v. State*, 432 S.W.2d 945, 946-947, that "a mental examination is not a confession, and therefore, would not be subject to the requirements and rules laid down by the Supreme Court of the United States in *Escobedo v. State of Illinois*,

378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, and *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694."

Further, the Court of Criminal Appeals, in *Patterson v. State*, 509 S.W.2d 857 (Tex. Cr. App., 1974) has reaffirmed their holding in *Gephart* and *Stultz*, holding that Art. 46.02, 2(f) (1), C.C.P., (now Art. 46.02, 3(a) and 3(b) and Art. 46.03,3), should not be interpreted as an exclusive procedure for obtaining psychiatric examinations and testimony.

In a very similar case in Colorado (*People v. Early*, 352 P.2d 112 cert. denied, 364 U.S. 847, 81 S.Ct. 90, 5 L.Ed.2d 70), the Supreme Court of Colorado held that a statute of similar impact to Art. 46.02, 2(f) (1), C.C.P., was not the exclusive method for the State to obtain a psychiatric evaluation. In that case, the State, prior to arraignment and the appointment of counsel, had two psychiatrists examine the defendant. The Court held that their psychiatric opinions were admissible, being neither a denial of due process or compulsory self-incrimination.

On a petition for Writ of Habeas Corpus in *Early v. Tinsley*, 286 F.2d 1 (10th Cir., 1960) cert. denied, 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed.2d 708, the use of this testimony at trial was upheld.

All of Federal Courts of Appeals which have examined the issue of the right of defense counsel to be present at psychiatric interviews, have held that there is no such right. *United States v. Williams*, 456 F. 2d 217, (5th Cir., 1972); *United States v. Smith*, 436 F. 2d 787 (5th Cir., 1971); *United States v. Baird*, 414 F. 2d 700 (2nd Cir., 1968); *United States v. Albright*, 388 F. 2d 719 (4th Cir., 1968); and *Thornton v. Corcoran*, 407 F.2d 695 (D.C.Cir., 1969).

It, therefore, appears clear that under at least one, if not two Texas cases, and a host of Federal Courts of Appeals cases, that the defendant in this case can raise no objection to an examination, ex parte and in private, for a psychiatric evaluation of his competency to stand trial and his mental state at the time of the commission of the offense, nor the admission into evidence of their opinion of either, as based on their evaluation.

IN THE DISTRICT COURT OF
TRINITY COUNTY, TEXAS
258TH JUDICIAL DISTRICT

(Title Omitted in Printing)

**ORDER APPOINTING PSYCHIATRIST
TO EXAMINE THE DEFENDANT**

Pursuant to Art. 46.02, Sec. 3, C.C.P., this Court appoints Felix Peebles, M.D., to examine the Defendant, with regard to his present competency to stand trial and with regard to his sanity at the time of the offense. Such examination shall be conducted for the purpose of determining (1) whether the Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him, and; (2) whether the defendant at the time of the alleged offense was capable of knowing that this conduct, if any, was wrong and was capable of conforming his conduct to the requirements of the law he allegedly violated.

It is further ordered that the above ordered examination be conducted outside the presence of Defendant's attorneys, and any other persons.

And, finally, it is ordered that the results of such examination shall be made available to both the State and the Defense.

SIGNED AND ENTERED on this the 12th day of March, 1980,

/s/ Joe Ned Dean
JOE NED DEAN
Presiding Judge

JOSE G. GARCIA, M.D., P.A.

Tomball, Texas 77375

This is a psychiatric examination performed on John Paul Penry. The date of the examination was February 25, 1980 from 2:15 to approximately 4:15 P.M. The examination was performed at the request of Mr. John E. Wright, Esquire, Attorney at Law, P.O. Box 808, Huntsville, Texas 77340. The examination was requested to determine competency to stand trial, as well as sanity at the time of the alleged offense.

John Paul Penry is a twenty-two year old Caucasian male, who was born May 5, 1956 in Lawton, Oklahoma. His father's name was John Penry and his mother's name was Shirley Lane Penry. When asked to spell the mother's middle name, he said "Just put Thompson, I can't spell Lane". He was asked if he understood the reasons why he was being examined, and he said that he did not, however, he was informed that the examination was for the purpose of determining his competency to stand trial. When he was asked to repeat what he understood that meant, he repeated the exact words that were said to him initially. Subsequently, he was told that he had the right to decline to answer questions during the examination, if he so chose. He was asked if he could explain what he understood was stated to him and he said "I forgot what you said". He was asked why he thought he needed to be seen and he said I need some help, medical help real bad. He proceeded to add "I hear some voices that tell me to do things, like killing myself and do something else, like go out somewhere and do bad things like burglary, I broke into a house. I see things most of the time like a person, a woman standing over me, saying wake up, come with me". And then he said that when he wakes up, he sees nobody. He also says there are time he finds himself talking to himself occasionally.

He was asked if he knew what he was charged with. He said "I am charged with Capital Murder". He was asked if he could inform us of what that meant and he said "Killing somebody, it was a woman". He was asked to inform us of the date this incident was supposed to have occurred and he said "This was supposed to have happened in November, but I can't remember what day or what year". When asked for the year at this time, he said it was 1978. Incidentally, ten minutes after he was met by me, he was asked if he remembered my name, and he said he did not remember. In fact, my name was repeated several times during the examination before he finally remembered it by the end of the session.

When asked where the alleged offense supposedly occurred, he said "It happened in Livingston, behind the school house in a house, her house" and proceeded to describe that she informed him that there was nothing wrong with the appliances that allegedly had been delivered and he stated that that's all he can remember. He does remember starting to force his way into the house, but nothing else.

He was asked if he knew the name of the person, who allegedly was killed and he gave the name of Pamela Carpenter, whom he described as eighteen years old and that she was married because "She said she was".

Subject stated that he had been previously charged with an offense and served time in the Texas Department of Corrections, in fact, he served three years on a five year sentence, and was discharged on August 6, but says he did not know the year that he got out, but knows that he got into the penitentiary February 1977 and he was unable to tell how much time he actually served. He said that the previous offense also occurred in Livingston, but does not recall the name of the complainant in the previous case.

He was asked how successful he had been in dating previously, and he said "My aunt always told me my dad would not let me go out with girls, because I was mentally retarded, but I told them I wasn't crazy" He said "My father put me in the State School since I was six years old and since I got out, all I've been doing, is looking at girls.

He was asked if he raped the complaintant in this case and he said that he did not. He said that somebody must have done it, but they thought I did it". He also says that there was another person at the house, that his name was David Finch, and that he also lives in Livingston. Then in another sentence, he said that he felt that somebody told him to hurt people.

He attended school through the first grade, but says that he cannot read. He was asked to write his name in long hand, and he was able to do that, however, when he was asked some additional information, he was unable to perform. This will be described further.

The rest of the history reveals that he was never married, that the reason he never married was "My dad would not let me". He was asked if he had had sex with a girl, and he said "One girl gave it to me, it happened about five years ago in Lufkin, while I was down there. Her name was Freida and I met her at a" he could not remember.

His father at present is forty-three. He is in good health, allegedly, and says that he lives in Livingston, but that his back hurts him a lot and that he used to work in a body shop, but does not believe that he is working at present. His mother is about age thirty-six and she lives in Columbus, Ohio. She and his father are separated, and they have been separated about six years. The reason they were separated was because the mother was an alcoholic. He then said that his mother used to beat him up with a tire tool, that supposedly, she didn't like him,

didn't want to have him and that his father put him in the State School "So my mother couldn't hurt me".

He has one full brother, two full sisters, two step-sisters, and three step-brothers. He said his youngest sister lives in Dallas, the oldest sister lives in Livingston, and then he says that he was next to the oldest but adds "I was the only one not treated right".

He was asked if he had had any surgery and he said no, however, he said that he was stabbed. When asked when, he said "When I went to that woman's house". He was asked to show me and he showed me the back of his right hemithorax. "She was scared that I might hurt her, I don't remember with what." He also says that he fractured his left arm, when his mother stomped on his arm and does not recall when it happened. He says he was told that his arm was broken in eight places.

He was asked if he smoked, and he said he smokes a pack of cigarettes per day, that he drinks a six-pack per day, when he can, that he works for his money to support this alcohol and his cigarettes. He said that he used to work for Jasper Jones, a carpenter, and that supposedly he was paying him twenty dollars per day. He was asked how he managed his money, since he was paid in cash. He said that his friend, Mike Schriever, usually comes with him to do any shopping "In case anybody tries to gippe me". He then added "As soon as they recognize that I can't read or write or don't know how to count money, they try to gippe me. A store in Huntsville tried to gippe me because of that".

MENTAL STATUS EXAMINATION reveals that this is a poorly informed, unsophisticated Caucasian male, whose speech is rather primitive and unsophisticated, but, who is making an effort to be cooperative. He was asked to write his age and he wrote in capitals I AM (23). He was asked to spell in writing the word cat, and he spelled car. He was asked to spell the word dog,

and he spelled didy. He was asked for the days of the week and he did not know the days of the week, however, when he was asked what day of the week he was being seen, he said "Today is Monday". When he was asked what the following day would be, or tomorrow in his terms, he said it would be Wednesday. He was asked what payday was, he said it was Saturday, and when church day was, he said it was Sunday, and that he did not know any other names for the days of the week. He was asked if he attended church and he says that he attends Hickory Grove Baptist Church, but does not know the name of the minister.

He was asked how many nickels were in a quarter, and he said there were four. He was asked how many dimes were in a half dollar, he said there were five. He was asked the months in a year, he said "Most people say there are six months in a year". He was asked how many would you say "I say there are eight months". He was asked to name the months and he mentioned February, August, July, September, November, June, September, although he was told that he had already given September. At this point he said "That's all I can remember". He was asked the name of the sheriff in Polk County and he said it was Joe Nettles and he said I know him pretty good. He did not know the name of the D. A. He was shown one dime, one nickel, and four pennies in my hand and he was asked to count the money and he was unable to count the total amount of money in my hand. Even though he was given the coins separate or together, he was unable to tell us the amount of money.

When he was asked what he thought was going to happen to him, he said "Everybody in Livingston doesn't like me, my trial is going to be in Groveton and they want to send me to death row". He was asked what he thought the role of the jury was, he says "They put you away". He was asked how he would talk to his lawyer differently than to the D. A. He said "I know he, my lawyer,

isn't trying to put me away, he's trying to help me. He was asked the role of the judge in the trial and he said "I don't know".

SUMMARY: The review of previous medical records was done and it is obvious that this individual has functioned at a retarded level since very early childhood. It is also apparent that there is a strong discrepancy between the verbal and performance intellectual functions, which is compatible with Organic Brain Dysfunction. The examination performed is consistent with an individual, who has moderately severe mental impairment from physical injury to the brain. If the history of multiple beatings during childhood is correct, such as allegedly described by the subject, including beatings with a tire tool, there is a strong probability of multiple injuries, caused at a very vulnerable period of time in his life.

IMPRESSION: Organic Brain Syndrome caused by Trauma with Mental Retardation, Moderate.

CONCLUSION: It is the opinion that although, at times Mr. Penry talks about what he thinks the facts in this issue are, his comprehension on a rational level is not pleasant. It is the opinion that this is a person who can be made to say anything that he is asked under any slight pressure and can be so very easily led. It is further the opinion that this person does not have sufficient present capacity to consult with his attorney with a reasonable degree of rational understanding, since he may have factual, but no rational understanding of the proceedings against him. In addition, it is the opinion that this lack of competency is not likely to be restored within the foreseeable future. Hospitalization is strongly recommended.

JGG:ds

/s/ Jose G. Garcia, M. D.
JOSE G. GARCIA, M. D.

JOSE G. GARCIA, M. D., P.A.
Tomball, Texas 77375

This is a psychiatric examination performed on John Paul Penry. The date of the examination was February 25, 1980 from 2:15 to approximately 4:15 P.M. The examination was performed at the request of Mr. John E. Wright, Esquire, Attorney at Law, P. O. Box 808, Huntsville, Texas 77340. The examination was requested to determine competency to stand trial, as well as sanity at the time of the alleged offense.

This is for further information regarding the history and information about the present situation. Please refer to the competency report of the same date. All of the available records from other hospitals and from various state institutions, with the exception of correctional department records, indicate that this person has been functioning at a retarded level for many years. It is, therefore, my opinion that this person has insufficient ability to appreciate the wrongfulness of his conduct and that he has insufficient ability to conform his conduct to the requirement of law. This is an individual, who is very impulse driven and that because of severe injury impairment, due to multiple head injuries, that he has insufficient volitional control of his behavior.

I am of the opinion that the discrepancy in his intellectual testing indicates, without a doubt, severe evidence of brain damage. Therefore, it is the opinion that subject meets the criteria outlined in Article 8.01 of the Texas Penal Code and 46.03 of the Texas Code of Criminal Procedure with regard with Legal Insanity.

IN SUMMARY, it is the opinion that at the time of the alleged offense, the subject was legally insane.

Thank you.

JGG:ds

/s/ Jose G. Garcia, M. D.
JOSE G. GARCIA, M. D.

IN THE DISTRICT COURT
OF TRINITY COUNTY, TEXAS
258TH JUDICIAL DISTRICT

(Title Omitted in Printing)

[CHARGE TO THE JURY ON COMPETENCY]

LADIES AND GENTLEMEN OF THE JURY:

The defendant, Johnny Paul Penry, stands charged by indictment with the offense of capital murder, alleged to have been committed in Polk County, Texas on or about the 25th day of October, 1979. You have been empaneled to determine the issue of the present competency or incompetency of the defendant to stand trial for such offense.

1.

Our law provides that no person shall be tried for a criminal offense while he is incompetent to stand trial. A person is incompetent to stand trial for an offense if he does not have:

- (a) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;
or
- (b) a rational as well as factual understanding of the proceedings against him.

2.

The defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

By the term "a preponderance of the evidence" is meant the greater weight and degree of the credible evidence in the case.

3.

The fact that the defendant is under indictment is no evidence of competency to stand trial and you should not consider such fact as evidence. Neither should you, in your deliberations, consider or discuss the guilt or innocence of the defendant with respect to the offense charged against him. You will confine your consideration and deliberations solely to the issues submitted to you.

4.

If you find by a preponderance of the evidence that the defendant, Johnny Paul Penry, is presently incompetent to stand trial for the offense, under the instructions herein given you, then you will find him incompetent to stand trial in the form provided for you hereinafter; otherwise, you will find him competent to stand trial in the form provided for such purpose.

5.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony, but the law you shall receive in these written instructions and be governed thereby.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you, nor any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you retire to the jury room you should select one of your members as your foreman. It is the fore-

man's duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form which you will find attached hereto, and signing the same as Foreman.

Bearing in mind the foregoing instructions, you will answer the special issues on the next page, placing your answers in the spaces provided therefor.

/s/ Joe Ned Dean
JOE NED DEAN
Presiding Judge

FILED: March 13, 1980

IN THE DISTRICT COURT
OF TRINITY COUNTY, TEXAS

Special Issue No. 1

Do you find by a preponderance of the evidence that the defendant, Johnny Paul Penry, is presently incompetent to stand trial for the offense charged against him?

If you find by a preponderance of the evidence that the defendant is presently incompetent to stand trial, your answer to the special issue will be "Yes; otherwise, you will answer "No."

ANSWER: No

If you have answered Special Issue No. 1 "Yes", then answer the following special issue:

Special Issue No. 2

Do you find that there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future?

If you find that there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future, you will answer the question by having the Foreman sign his name as Foreman to the first answer below; if you do not so find, you will answer the question by having the Foreman sign his name as Foreman to the second answer below:

ANSWER:

(A) We, the Jury, find that there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future.

Foreman

or

(B) We, the Jury, do not find that there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future.

Foreman

VERDICT

We, the Jury, return in court the above answers as our answers to the special issues submitted to us, and the same is our verdict in this case. 4:45 P.M.

/s/ Thomas Mochman
Foreman

IN THE DISTRICT COURT OF TRINITY COUNTY, TEXAS 258TH JUDICIAL DISTRICT

(Title Omitted in Printing)

[CHARGE TO JURY ON PUNISHMENT]

LADIES AND GENTLEMEN OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the offense charged in the indictment, that is, capital murder, which was alleged to have been committed on or about the 25th day of October, 1979 in Polk County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The court, however, instructs you further, as follows:

1.

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the

Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the jury's deliberations.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the Jury shall be "No" to that issue, and the Foreman will so record the Jury's answer by signing his name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No", then there shall be no answer for that Special Issue and the Foreman should not sign his name to any answer form for that Special Issue.

3.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

4.

During your deliberations you are not to consider or discuss any possible action of the Board of Pardons and

Paroles or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

5.

The Special Issues, with forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

/s/ Chris T. Burkholder
Foreman

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No".

Foreman

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

/s/ Chris T. Burkholder
Foreman

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No".

Foreman

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

ANSWER

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

/s/ Chris T. Burkholder
Foreman

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No".

Foreman

/s/ Joe Ned Dean
JOE NED DEAN, Judge
258th Judicial District Court

VERDICT

We, the Jury, return in open court the above answers as our answers to the Special Issues submitted to us, and the same is our verdict in this case.

/s/ Chris T. Burkholder
Foreman

TESTIMONY AT THE COMPETENCY HEARING

IN THE DISTRICT COURT
OF TRINITY COUNTY, TEXAS
258TH JUDICIAL DISTRICT

(Title Omitted in Printing)

* * * * *

JEROME B. BROWN

[550]

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q State your name, please.

A My name is Jerome Brown.

Q All right. Would you state your address, please?

A My address is Baylor College of Medicine, 1200 Moursund Avenue in Houston.

Q All right. And what is your occupation or profession?

A I'm a clinical psychologist.

Q All right. And at what address do you practice your occupation or profession?

A At the same address.

[551] Q All right. Are you a licensed psychologist?

A Yes. I've been licensed by the State of Texas since 1971.

Q All right. Would you outline your formal education, including your undergraduate and college training?

A Yes. I have a B.A. degree from Rice University in Houston, and an M.A. and Ph.D. in Clinical Psy-

chology from the University of Houston. I've served a two year internship at the Houston Veteran's Administration Hospital, and since 1969 when I graduated, I have been employed in various capacities as a psychologist in Harris County, mainly.

BY THE COURT: Excuse me just a minute. Can you all hear him on the jury all right? All right. We don't have a PA system, so—

BY MR. BROWN: Fine. Your Honor, I'll try to speak up.

BY THE COURT: All right.

(Mr. Wright Continuing) Do you belong to any professional organizations or societies?

A Yes. I'm a member of the American Psychological Association, the Houston Psychological Association, [552] and the Association for the Advancement of Psychology.

Q All right. Now, your experience actually practicing your profession began approximately when?

A In 1969. I have a number of positions, academic positions include the assistant professor in the Department of Psychiatry at Baylor College of Medicine. I am clinical assistant professor at the University of Houston Department of Psychology. I am adjunct professor at the South Texas School of Law. I am also employed as senior psychologist for the Harris County Forensic Psychiatry Unit, and I'm chief psychologist for the Jefferson County Forensic Psychiatry Unit. I'm employed as consultant to the Post Oak Psychiatry Associates, and I'm a consultant to the Harris County Hospital District and the Ben Taub General Hospital.

Q Now, have you testified many or few times in cases in court?

A Much of my work involves court related matters. This requires, on occasion, my having to testify in court. This is principally with regard to my role as psychologist for the Harris County [553] Forensic Psychiatry Unit, which involves my being consultant to the Harris County Criminal Courts.

Q All right. Do you most often testify on behalf of the State or on behalf of the individual?

A Well, to date most of my experience has been testifying on the request of the State, although I have testified as a defense witness also.

Q Have you conducted an examination of Johnny Paul Penry?

A Yes. I saw Mr. Penry for approximately two and a half hours this morning and approximately another thirty minutes just after lunch today.

Q All right. Have you examined various records pertaining to Johnny Paul Penry?

A Yes. I've reviewed a rather large number of records concerning his past history, past treatment, past evaluations that he has had over most of his life.

Q I'll hand you what's been marked as Defense Exhibit Number Two and ask you if you've had a chance to look at this earlier today?

A Yes, I have. I've seen this report before.

Q And that's the report from the Mexia State School, is that correct?

[554] A Yes, it is. This is the one dated 1968, when he was an in-patient. He was confined there.

Q All right. I'll hand you now what's been marked as Defendant's Exhibit Number Four and ask you if you can identify that, please.

A This is a report dated 1979 from the Rehabilitation Division of the Texas Rehab Commission. I've also reviewed this before.

Q All right. And Defendant's Exhibit Number Three. Have you had a chance to look at this before?

A Yes, these are his records pertaining to his confinement to Rusk State Hospital. Yes, I've reviewed these.

Q All right. Now, Defendant's Exhibit Number One. Have you had a chance to review that exhibit?

A Yes, I have. These are mainly just the nursing notes and records from his stay at Rusk State Hospital in 1973.

BY THE COURT: Let her mark this exhibit.

(Defendant's Exhibits Five and Six Marked for Identification)

BY MR. WRIGHT: I'll offer Defendant's Number Five and Six, which are records received from [555] the Division of Child and Adolescent Psychiatry, the University of Texas Medical Branch at Galveston, Texas.

BY MR. PRICE: No objection, Your Honor.

BY THE COURT: Do y'all want to stipulate that they can be introduced under the Business Records Act without having someone up here to prove them up?

BY MR. PRICE: Yes, Your Honor.

(Defendant's Exhibits Five and Six offered in Evidence)

BY THE COURT: All right. Defendant's Five and Six are admitted without objection.

(Defendant's Exhibits Five and Six Admitted without Objection)

(Mr. Wright Continuing) I'll hand you now Defendant's Five and Six and ask if you've had a chance to examine these records.

A Yes, I've examined these records before.

Q All right, Dr. Brown. Are these the documents the type of documents that a person in your [556] profession would routinely examine in the course of an examination of a person with a view toward determining his competency to stand trial?

A Yes, I think these records are important in that respect.

Q All right. If we can, let's turn first to the earliest set of records, which I believe are the ones from the John Sealy Hospital. Unfortunately I don't have a copy of those to use in my questioning, but tell me this about those records. Do you find in there any indications that

he was tested for his intelligence? To see what his intelligence level was.

A Yes, a part of the work up that they did included the psychological evaluation, including intelligence testing.

Q All right. Do you find his test scores in there?

A Yes.

Q All right. Exactly what are those scores?

A He obtained a full scale IQ of 56 on this particular test, which was administered in August of 1965.

Q What does that mean, a full scale IQ?

A It places him in the range of moderate mental retardation, which essentially means he is scoring [557] in the bottom one percent of the population.

Q Does that mean on the average, ninety-nine out of a hundred people are smarter than he is?

A That's right.

Q All right. Now, were there any other intelligence tests administered at UTMB back in 1965 or 66, whichever that is? According to those records?

A According to this record I don't think they refer in this particular record to any other psychological evaluation, except—

Q I'm not sure if there was one there. I'm not trying to—Tell me this. From what you do have there, can you compute a mental age based on those exams that they did give?

A Well, on these particular evaluations, you don't obtain a mental age, but the findings are more or less consistent with the evaluation I performed today, which I was able to obtain a mental age.

Q All right. We'll work up to date through these records. Tell me this. Did—There is a diagnosis in there by a psychiatrist, is there not?

A Yes, there is.

Q All right. And that diagnosis is that this man has sustained at some time or other organic [558] brain damage, isn't that correct?

A That's correct.

Q What does that term mean, organic brain damage?

A It means that there is some kind of dysfunction or damage to the brain tissue that interferes with his ability to function normally.

Q Well, does that mean that there is some tissue that he just doesn't have that the rest of us have?

A The particular brain damage they are referring to probably occurred at birth, and results in a poor or lack of development of the brain tissue. So the brain is underdeveloped in some kind of way.

Q All right. Is there anything else in this diagnosis or in any of this material from John Sealy Hospital which would be in any way helpful in determining his competence now?

A Well, I think several of the things are important. First of all, from a very early age, this man has been documented as being difficult to control. He has very great difficulty controlling himself, and behaving in the usual situations like other children. He has—I think the idea of being able to control and discipline himself is important. The short attention span, the [559] impulsivity has been documented from an early age in this young man.

Q You say this idea of control is very important. What do you mean by that?

A Well, even in these early records, we are seeing indications that his ability to conform to the regular way of doing things to discipline himself, to follow instructions, to carry out some sort of plan is severely impaired. He simply cannot do what he's told to do for very long. The word impulsive means that he's prey to his own urges or impulses at the moment. He doesn't have the ability to say, "wait a minute, I'd better not do this. I better wait or better not do it at all." The short attention span is important. This means that he can't attend to things for any length of time. He can't focus. He can't concentrate. I think those are the major factors with regard to the issue of competency in these

reports. For the sake of being brief, I'm not going to try—

Q All right. I believe the next set of items comes from the Mexia State School. Let me see if I'm correct about that. It would have been his admission in 1968. Do you find anywhere in [560] those records any evidence that any psychological testing or intelligence tests were administered there at the Mexia State School?

A Yes, they administered also an evaluation.

Q All right. And would you tell the jury what the results of these tests were? And what the tests were?

A Well, they administered the Weschler Intelligence Scale for Children, which is a very commonly used IQ test for children. In this case, they obtained a full scale IQ of 51, which is more or less the same as the one I mentioned earlier, a 56, I think. So again, we are finding him operating in the moderate mental retardation range. We also have continuing signs of a brain dysfunction or brain damage and a number of other functional difficulties that are consistent with the idea of the mental retardation.

Q All right. Is there any indication of any test there that would give a mental age at the Mexia State School?

A No, again the particular test that they used did not give a mental age.

Q All right. The next two are close in time. I [561] can't easily determine which was exactly first, but we'll take the one from the Austin State Hospital next. Do you find that any psychological testing that was administered there? I know that there is a greater number of documents there.

A Well, there are several evaluations in here. There was an evaluation done by Dr. Exter Bell in Houston. It's a psychiatry evaluation.

Q Would that be about 1973?

A Yes. And he diagnosed him as moderately mentally retarded. He obtained a full scale IQ of 50 on the

Weschler Adult Intelligence Scale, during this particular stay in the hospital. Again, that is the moderate mental retardation range.

Q All right, sir. So that then would be a decline from the previous one although a slight decline.

A A slight—yes.

Q If I'm correct, in UTMB in 1965 he got a 56. And then in 1968 at the Mexia State School, he got a 51, and in Austin State Hospital he got a 50, is that correct?

A Yes.

Q All right. I take it that those are the high [562] points out of the documents that you have there, or have you just not had an adequate time to look at them?

A Well, if you'd like for me to comment on the issue of competency, you mean, the high points here.

Q Yes.

A Well, there are a number of things I think that are important. First of all, in 1973, when this hospitalization took place, he was diagnosed as psychotic. This means that something had happened to him, such that his ability to see reality or see the world around him as other people see it was severely impaired. He was hearing things and seeing things and developed a number of paranoid ideas about being attacked that were not based on any kind of reality, and he was—this was one of the main reasons for his hospitalization at that time. Again, the evaluation showed strong evidence of brain damage. His visual motor coordination was extremely poor. His motor control is quite poor. The evaluation by Dr. Bell indicates that he was impressed to the degree that he did not feel like he could function by himself at all in a [563] social setting. That he would be subject to influence and manipulation by people more intelligent or sophisticated than he was. He is unemployable. He could only perform simple tasks. He felt that he would be exploited in something like a prison setting. He would be subject to attack by other inmates. He felt that he could not control himself when

he was upset or under stress due to his lack of intelligence and his inadequate personality development. He is only able to understand simple words and phrases. His thinking is extremely concrete and on a superficial, simple level.

Q What does that mean, doctor?

A That means that he has only a very black and white kind of understanding of what's taking place. He has no ability to understand subtleties or nuances or to understand the implication of what's going on around him except in a very, very simple way. It's a long history of being exploited by others, abused. I think those are the main points.

Q All right, then. The records from Rusk State Hospital, again rather voluminous, however, I [564] think we need to go over them. That again is what—those are from when? Sometime also in 1973?

A Well, he was discharged in 1974, early, but they go from '73 to '74. Again, the documentation and the comments about his behavior and his thinking are pretty much consistent with the other records. They once again document his brain damage and his history of abuse and history of being taken advantage of, history of difficulty controlling his behavior.

Q Did they administer any psychological testing?

A Yes, and they also administered psychological testing during this stay, if I can find it. They did not give a score, but they again administered the Weschler Adult Intelligence Scale and obtained a range in the upper mild mental retardation. Again the brain damage is documented. The deprived social background.

Q All right, Dr. Brown, I do believe I have some scores in mine. I'm going to let you look at what I have here and see if you can find it in yours.

A I'm sorry. They do. Here are some scores on the next page. I didn't see it. They obtained a full scale IQ at this time of 63.

[565] Q Is there anything else in there that the jury ought to know about with regard to his—might be helpful in their forming a judgment regarding his competence now?

A Well, just a general comment. If you look at the nursing notes concerning this kind of day to day behavior on the ward, while he was there at Rusk you'll see that Johnny had a great deal of trouble taking care of himself there on the ward. He was prey to both his own impulses and also the other inmates. He was also fearful of them and felt that he would be hurt by them. There are several notes in there about that. It was obvious to me upon reading this it was difficult for the staff to tell when he was telling the truth and when he wasn't. That he was unreliable to them. For example, there is one note in here that says "it is to be noted that he might be telling the truth sometimes." So, the staff are confused about what he's saying. They seem to be perplexed as to what to do with him to help him. His behavior alternated between becoming difficult and obstreperous to being extremely complacent and approval seeking. He seemed to routinely do [566] poorly, when he was released to go home for a visit. They couldn't even let him out long enough to go for a weekend furlough without him having some kind of difficulty like running away or becoming upset with his family in some kind of way. There is notes in here that he admits to doing things to the staff that he didn't really do in order so he wouldn't be picked on by them. They could coerce him into saying that he did things when he didn't do them. These are the other inmates, in-patients would bully him. Well, again for the sake of brevity, this is the general gist of the kind of notes and things that I think are important in terms of what we are trying to decide today.

Q All right. One more set, much more brief, the Texas Rehabilitation Commission.

A Well, again, I think the most important aspects of this is the intellectual evaluation again, which revealed the verbal IQ of 56, which is again mild to moderate range of mental retardation. The comments I think are relevant from the psychologist in the report in this case, and this was last year, 1979, I believe. He lacks the ability to apply any [567] basic academic skills to his daily life activity. He has exhibited inappropriate reasoning and judgment in daily life activities. He has not mastered basic social skills, which would allow successful participation in group activities. He is unable to function independent in the community and in gainful employment. He has exhibited an inability to conform to standards set by the community. His reading level is between the first and second grade. His spelling level is at the second grade. His arithmetic ability is in the early kindergarten grade. He is unable to read and write. He doesn't have any appropriate internal controls. He has poor vision. He cannot perform fine motor tasks. Very poor family background. His work history is essentially nil. He's been able to earn some money every now and then under the supervision of someone else. He—Well, again the history of exploitation by others, being victimized by others is revealed once again. His attention and understanding of problems and instructions given to him for the test was below average. Engaged in little spontaneous conversation. [568] Okay. That's it.

Q All right, sir. And then didn't you examine this morning and also administer psychological tests this morning?

A Yes, I did.

Q Would you tell us what your observations were this morning?

A Well, in addition to the administration of psychological tests, I also interviewed him at length, but the tests I administered because of the past records, we have a fairly accurate documentation of the past difficulties

he has had, so I didn't go into a lot of extensive testing that would be repetitive. What I tried to do was once again document his intellectual level, which my results again produced an IQ of 54, which is consistent with the other results. The particular mental age that I obtained for this man was 6½. Now that means that he has the ability to learn and the learning or the knowledge of the average 6½ year old kid. I administered a estimate of social maturity. This is kind of how well you can take care of yourself and how well you can function in the world around you. On this particular test, he [569] did a little bit better. He was able to score at the 9 or 10 year old level. In other words, he knows how to get around in the world about as well as the average 9 or 10 year old. Again, I administered a test of visual motor coordination and memory, which reflects the organic brain damage or the brain dysfunction that he has exhibited throughout his life. The results of the evaluation together with my interview indicate that he is a very simple and limited person. His understanding of the world around him is very concrete, and in terms of time, he is pretty much oriented from one moment to the next. His understanding of history, for example, is only in terms of before and after. He is very limited in his ability to understand what is taking place, and has only a very simple and very general kind of understanding about what is taking place, for example, here today in the Courtroom.

Q Do you find that he is suggestible? By that, I mean if you suggest an idea, does he accept that idea as true or what does he do?

A I think he is extremely suggestible. It seems to me that the history and also my contacts with [570] him indicate that he is very prone to give things to people depending on what he thinks they want from him. The long history of being exploited and used by other people indicate that it's very easy to manipulate him. It's very easy to influence him. It's very easy to get him to have

his judgment affected by whatever pressure that is put on him—pressures are put on him at the particular moment in time. Depending on who he is talking to and who he is with and who's friendly to him, he will go along with them. His judgment will be colored by whatever he is told from one moment to the next, depending on how much he trusts or likes a person. The histories are information about how he would simply get in a car with somebody and go somewhere, if they ask him to. Things like this. In my opinion, his judgment is colored by whoever he's involved with at the moment.

Q There's not any real question, is there, that he can talk to you, is there?

A I think he does a pretty good job talking. I think that is one of his more positive characteristics.

[571] Q All right.

A I think he is able to converse fairly well.

Q And no reason to believe that he couldn't talk to his lawyers is there?

A I think he can talk to them. I think he can answer questions. He has a limited vocabulary, but he's able to use what words he knows fairly well. He's able to speak in sentences, and I think that's an asset for him.

Q All right. Can he be of any assistance, do you think, to his lawyers?

A I think his ability to assist his attorney is going to be quite limited, and there is a number of reasons for this. First of all, you've got to be very careful how you question him. He can only understand simple words. It has to be put to him in very simple ways. As many people with his intelligence level, he acts like he understands something, when he really doesn't. So, you're fooled. You just go on with your questions or your talking to him and he acts like he understands and you continue on. And somewhere down the line, he'll indicate, if you question him carefully that he doesn't understand at all what you've been talking about [572] for the last five minutes. His memory is extremely poor. It's very

difficult for him to remember instructions from one moment to the next. Only the most—very important facts will he be able to recall from one day to the next. For example, an attorney trying to tell him "don't do this" or "please do that" or "watch out for this" would be extremely frustrated, because he wouldn't be able to remember until the next day it would be a whole new ball game for him. You'd have to start all over and say now remember what I told you. I told you this and this and this, and you'd have to tell him all over again. If anyone comes along in the meantime and says, "well forget about that. Do this and this and this," then he'll do that until you tell him something else. Then he'll do it back the other way.

Q Doctor, if an idea or a series of ideas were just drilled into him over a long period of time, do you think that that would cause anything to stick in his mind?

A Yes, I think he can learn things. It's not like his mind is like a sieve and everything runs out of it, but things have to be repeated [573] over and over and over again over a long period of time before he finally gets it. This is because his rate of learning is so very very slow, because of his intelligence.

Q All right. Can, do you think his attorneys or anyone else for that matter, rely on factual statements that he may make regarding the facts of this case?

A Well, I would think that an attorney would be extremely dependent upon what his client told him. The attorney has to know that what his client's telling him is reasonably true. That it's factual, and if this story changes or the facts change from one moment to the next or one day to the next, the attorney is going to be completely, I think, confused, if not totally frustrated, in trying to get some version of what the truth is out of his client, out of this man, particularly. Because of the confusion and the variations in the stories that would occur from one day to the next.

Q Well, if one of his versions is exculpatory and the other condemns him, is there any reason to believe the

one that condemns him any more than the one that exonerates him?

[574] A Well, again, because of his desire to please and his attempts to make himself look good from one moment to the next, you don't know what he's going to rely upon. Again, his inconsistencies are such that it's difficult to believe what he says, regardless of whether it's exculpatory or whether or not it's condemning.

Q So, as far as you are concerned, any statements that he might make to condemn him are not entitled to any greater weight than the ones that don't? Is that—

A I think if you relied upon him alone without any other evidence, I think that I would not trust what he told—I wouldn't know any way to believe. I don't know how to evaluate at this point in time what he has told me as being the truth, other than from other records that I have available to me.

Q Now, you are saying that you can't tell if he's telling the truth or not. Do you have any sense that he's trying to deceive you or actually intentionally tell you a mistruth?

A I think at times he does try to mislead me and deceive me, but again his attempts are so [575] pathetic that they are so obviously fabricated and so obviously don't hold water that if you push him a little bit, he'll break down and tell you another version or tell you another story. If you tell him, "now wait a minute. I don't believe that. You better tell me the truth." He'll say, "well, well. I think it was this way." And then he'll tell you something else. You know, under those conditions, it's very difficult, I think, to know what to believe.

Q Now, doctor, you're familiar with the legal test for competence, are you not?

A Yes.

Q All right. Isn't it part of that test that he have to have a sufficient present ability to consult with his lawyer

with a reasonable degree of rational understanding, isn't that your understanding of what the test is?

A That's right.

Q All right now. Let's break that down a little bit and try this. Do you think he has the sufficient present ability to consult with his lawyer at all?

A I think he has some ability, yes.

[576] Q All right. Now, what about the part that says with a reasonable degree of rational understanding?

A Well, a reasonable degree—in other words, I guess, the degree that a person would reasonably expect someone to have. I have serious doubts about this. You know, here is a man that's essentially unable to survive by himself in the world. There's no instance of any time that he's ever spent by himself caring for himself. He's always been with someone else. He's always had somebody else to take care of him, buy his clothes for him, such things like this. He has no idea of the trial proceedings that are going on today, except that somehow he knows that this is a courtroom, and he knows somehow that this is important for his future. He has no idea about this is a hearing versus a trial. He has no concept of this whatsoever. He only knows one of his attorneys' names. He doesn't know what a DA or a prosecutor is. He hardly knows when to speak or to keep quiet. When I was talking to him down in the jail this morning, deputies for example, would go in and out, and he would just continue talking with his story, regardless [577] of what he was talking about. He would take no notice of them, whether they were in the room or not. Who was there listening, he could care less. He just doesn't pay any attention to it. He has no idea that these people somehow might be his adversaries in some kind of way. He talked once about his attorney asking him if he'd had his rights read to him, when he was arrested, this kind of thing. He had no idea what reading your rights meant. He had no idea what they

were talking about. He has no idea what his legal rights are. He didn't even—

Q Let me stop you right here.

A He didn't even know my name an hour after I talked to him. Yes.

Q Let me stop you right there. If he said—

(OBJECTION)

BY MR. PRICE: Your Honor, we're going to object to this as leading the witness and telling him what he wants him to testify to, I think is what we're fixing to hear here.

BY THE COURT: Go on and state your question.

(Mr. Wright Continuing) If, for example, Johnny Penry [578] stated that an hour or two after you spoke with him this morning that he did understand what his rights were, I take it that that would be in a direct conflict to what he told you, is that correct?

BY THE COURT: Just a moment, doctor. Are you still objecting?

BY MR. PRICE: No, sir. I'll withdraw the objection.

(Mr. Brown Answering) Well, I'm not surprised that he would say that although if you asked him what do you mean read your rights. Tell me what your rights are. Tell me what reading your rights means, he can't tell you.

Q Okay.

A I'd be very surprised if he were able to say what his rights were, if he were asked that.

Q Well, do you think he could be lead into saying that he did? Do you think—

A Well, yes.

Q If someone were to ask him, "now do you know what it means to have an attorney" he might be able to nod his head and say yes." Do you think he could do that?

A Yes, he's very agreeable.

[579] Q Is he likely to do that?

A He will agree with anything you say, just about. The test of it is to have him explain to you what does that mean. What does it mean that you have a right to an attorney. Tell me what that means. He can't do it. Again, he indicates he understands. He says he understand, but then if you ask him what he means by that understanding, he doesn't know what you're talking about.

Q Well, let's go back to this legal test again. This present sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, does he pass that test or does he flunk that test in your view?

A I don't think he passes that test. I don't think what we have here is a reasonable understanding of what is going on. I think a reasonable ability to talk to your attorney and prepare a defense is not available to this man.

Q And if I understand your testimony correctly, the reason you say that or one of the reasons, I don't want to tie you down to one, but one reason is his very low IQ, is that correct?

[580] A Well, that's at the basis of it all, really. That and the brain damage that's associated with the low IQ. Again, it easily makes this man unpredictable. He's changeable. He's subject to influence to whatever's happening to him at the moment. Ideas can be put into his head. Ideas can be taken away. He can't follow consistent plans. So, I don't think that's reasonable.

Q All right. Now, you say that knowing full well that that means there's some group of individuals with very low IQ that are very likely to be incompetent to stand trial, don't you?

A Well, I think there's a point at which anyone with that IQ is always incompetent, but, you know, this man is more in the borderline range. Some people with his level can technically be considered competent. Some people at this level would technically be considered incompetent.

Q All right.

A So, it's a more gray kind of area. It's very, very difficult when you have to question them very carefully and examine them very carefully.

Q All right. And so, your answer to my earlier [581] question in which you said he flunked the test is in all truth and candor based in part on your judgment, isn't that correct?

A Yes, it's my judgment. It's my opinion, and it's based on my training and experience. It's the best I can do.

Q And your training is in the field of psychology isn't that correct?

A That's right.

Q And, am I correct in thinking that psychology is the accumulated knowledge concerning the mind and the human processes?

A Yes.

Q And so this is the body of learning that man has accumulated throughout his existence on this field of study?

A Yes, it is.

Q And, you've done the very best job that you can today, have you?

A Yes, with the limitations of time and other things considered. Yes.

Q Were the medical records that were accumulated here of any help to you?

A I believe it's important. It's especially important in terms of documenting historically [582] and in a very consistent way the problems this young man has had throughout his life. That what we are seeing here right today is somehow not recent. That he's been plagued by these difficulties ever since he was born, essentially.

Q Okay. It's helpful then in making your judgment to have these records available to you?

A Yes, I believe so.

Q All right. Just to be doubly sure that we haven't missed the whole point here, I want to ask you this. Do you have an opinion as to whether or not he is presently competent to stand trial?

A I don't believe he's competent in the sense that he can sufficiently help his attorney in defending himself. I don't think he can do that.

Q We'll pass the witness.

BY THE COURT: All right.

Mr. Price, you may proceed.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q I believe you and I have met before in a courtroom in your hometown of Houston, isn't that right?

A That's right.

[583] Q In the Tullos trial, I believe, wasn't it?

A That's right.

(OBJECTION)

BY MR. NEWMAN: If the Court please, may we approach the bench?

BY THE COURT: Yes, sir.

BY MR. NEWMAN: We are going to object to Mr. Price referring to or alluding to the Tullos trial because it is a well known case, highly known in this county, the local banker which was killed by a person by the name of Tullos. It received wide publicity and it is commonly known in this country and that the doctor testifying in this case testified that the man was incompetent and would never be competent. And it is well known also in this county that the defendant, the one that killed the man, was turned loose about seven and a half months. And we think that this line of questioning is highly improper and not done in good faith but to prejudice the minds of [584] this jury in view of the fact that they are all well acquainted with that fact

situation. It is so highly prejudicial that we are asking for a mistrial because of the District Attorney alluding to the Tullos trial.

BY THE COURT: I don't think there was hardly any jurors that heard it and I will instruct them to disregard the last statement of counsel. I don't think hardly any of them heard him say "the Tullos trial". I am not positive of that. I am going to instruct them to disregard it and you, Mr. Price, are instructed not to allude to anything concerning the Tullos trial.

BY MR. PRICE: If I may, for the record, all I was trying to do was ask him, and I would like to do this, but I won't if there is an objection. The fact [585] that he did testify for the defense in the last trial that I was identifying, so he would know what case I was talking about, that is the only trial I was in that he testified in. I think I have the right to point that out.

BY MR. NEWMAN: Our motion for mistrial is overruled?

BY THE COURT: Your motion for mistrial is overruled. Ladies and gentlemen, you are instructed to disregard the last statement of the District Attorney. Now, Mr. Price, you can proceed with your examination of Dr. Brown.

[586] Dr. Brown, I think Mr. Wright asked you a while ago about your testimony and you stated that you've testified a lot for the prosecution. The only purpose for my question is the fact that I want to point out that twice you and I crossed paths and both times you've testified for the defense, is that right?

A That's right. On that other occasion I was a defense witness.

Q Right. And you are a defense witness here today?

A That's right.

Q Dr. Brown, we went over some of these records, and I'm sure some of these jurors are a little curious since we've been waving all these records in front of them for a couple of days here, but—Well, first of all,

the Mexia State School is not a facility for mentally ill people primarily is it. It's really a school for the mentally retarded, isn't it?

A It's a school for mentally retarded, principally. Yes.

Q And in a sense of a mental institution, it's not a mental institution, is it in the strict sense of the word?

A No, it's mainly for children who are below [587] average in intelligence and require special education or special facilities.

Q So with regard to any institutions that this man may have been in, I'd like to talk about that a little bit, at least, based on these records here. Would you look at his records from Austin State Hospital and tell the jury what period of time he was in the Austin State Hospital?

A He was there from September 11, 1973 to October 3rd, 1973.

Q Would that be about twenty-two days?

A Yes.

Q Okay.

A And was transferred.

Q And that was in 1973, some six and one-half years ago, is that correct?

A Yes.

Q Now, would you look at the hospital records from Rusk State Hospital and tell the jury what period of time he was incarcerated there or there anyway?

A Well, he was transferred from Austin on October 3rd, 1973 and stayed there until January 4th, 1974.

Q That would be approximately 90 to 93 days, [588] would that be about right?

A Yes.

Q So, these two confinements in a mental hospital were actually one confinement, although he was transferred from one hospital to another, is that correct?

A Yes.

Q A total confinement of less than 120 days.

A Yes.

Q And both of those confinements were back in late 1973 up through January of 1974, which would be approximately six or a little over six years ago.

A Yes.

Q Do you know of any confinements in mental institutions since that time?

A I don't have any records available that would indicate he has, no.

Q Back on the John Sealy records, did that indicate that he was actually confined in the hospital or treated as an out patient?

A I believe he was treated as an out patient through the John Sealy Adolescent Clinic or something like that. I think he went there for evaluation and treatment, but no hospitalization [589] or no in patient treatment.

Q And when was that? I'm not even sure those records even show this.

A Well, it was in July of 1965.

Q Okay. That would be some, almost fifteen years ago.

A Yes.

Q Doctor, would you explain to me again. I didn't really understand what you meant by organic brain damage.

A Well, in this particular case, what we are meaning is that there is some kind of trauma occurred very early in life, probably during birth that resulted in abnormal or under development of the brain tissue. This doesn't mean that if you opened up his brain and looked or opened up his head and looked at his brain that you'd see anything wrong with it. It's just that it hasn't developed normally. There is something about the way the brain protoplasm has developed that it's not adequate. Some people have brain damage and like, you can notice that there is a tumor, that there is a lesion in the brain

or some kind of obvious damage to brain tissue. This is not the case in this instance, I don't [590] believe. What we are dealing with is underdevelopment.

Q So, if I understand you correctly then, there is not type of physical type test or examination that can be applied to this individual that to conclusively establish that he had organic brain damage?

A I don't believe so, no.

Q In other words, there is no x-ray or brain scan, EEG, would it necessarily show?

A I don't think so.

Q In fact, he's had EEG's.

A That's right.

Q And they show normal?

A They were within normal limits, yes.

Q All right. So basically, what we are talking about is an opinion based on these tests that you or some other psychologist or whatever that may have given them?

A Yes. What we are talking about is a brain dysfunction. Something is obviously wrong with his thinking and behavior and that we associate with the brain—poor brain development. But it's an inference that we make. That's true.

Q Back in 1973, did you notice in his records, [591] I believe, to the Austin Hospital that there was a rather extensive history given or at least typed up in his records?

A Yes.

Q Who gave that history to the hospital people?

A Let me read this. Okay, now. His aunt and, I believe, his sister, and one other person, I'm not sure who that is—I guess it's also an aunt gave the social history in this particular case.

Q So essentially the people that have given the information to the doctors and what not, were members of his family?

A Yes.

Q And at that time, didn't his records also indicate that he had arson charges pending against him in Harris County?

A Yes.

Q In fact, he had been incarcerated in the Harris County Jail for some period of time prior to going into the hospital, hadn't he?

A That's right.

Q Did I understand your testimony correctly a while ago that the records of Austin and Rusk as well indicate that other inmates were picking on him and would jump on him or harm him or [592] something of that nature, is that what you were saying?

A That he was fearful of it. My glancing through the records didn't indicate that he was actually attacked by other inmates, although there are indications that in various institutions he has been. But on these particular notes, what I was referring to is his expressed fear that that would happen to him. He seemed to be worried about being intimidated by other inmates.

Q Would you flip over to the nurses records, please?

A 9-16.

Q I'll just ask you to follow along with me, if you would and see if I'm reading this correctly, but on 9-16, I guess that's '73, the first part of the entry is: "The last two days, he has made sexual advances toward the other male students. One became very hostile and threatened to do bodily harm if he continued to act strange."

A Yes.

Q Do you reckon these homosexual—I guess you could call it homosexual—acts would cause other students maybe to have these hard feelings toward him?

A I think that could be provocative, yes. That's [593] probably one reason why they didn't like him.

Q Would you flip to the next page, Doctor, and look on 9-24-'73. It would be the next date, and look at 12:00 P.M. The first part of it reads, if I'm reading it cor-

rectly: "Hassle with another student had to take knife—had a table knife and went toward the student with it. I called him once and went up to him, told him to put it away—put it down and walked away."

A Yes.

Q Then on the same day on the 3 to 11 shift at the bottom: "constantly bothering other patients in early evening. When patient wasn't picking at other patients, he played cards and watched TV."

A Yes.

Q Then on the next page on 9-26-'73, 7:30 P.M. "started hassling other students and stuff—had all the other student on Annex upset." Then the next page on 9-28: "better today. Only hassled one student once." And then on the next date, 9-29-'73 on the 3 to 11 shift: "patient constantly hassling others until he went to bed at 10:00." Doctor, that's over several days there, and I don't see where the other students were bothering him or he is [594] fearful of them, as much as it appears that he's the one that's the aggressor.

A Yes, he is very obnoxious, and I pointed out earlier that he has trouble controlling his own behavior and provokes other people. And they in turn isolate and reject him and don't like him and aggress against him. So it's mutual, I think he has trouble getting along.

Q I believe you also testified that in Austin IQ testing showed a 50, and then at Rusk a 63, is that correct?

A Yes, I believe so.

Q Those tests would have had to have been performed in a very short period of time, because he wasn't at either hospital more than 120 days.

A Yes, sir. Within a couple of months, I'm sure.

Q Is that a significant jump in his IQ of 13 points?

A It is. Again, with people of this intellectual level, you do get discrepancies like that, if they are feeling particularly bad or don't want to cooperate, they might do poorly on one test, and then if they feel good one day, they might do better on another test. So it varies. It can vary that much.

Q I also noticed that you said that he was [595] diagnosed as suffering from psychosis, when he was put in the Austin Hospital?

A Yes.

Q Is he still suffering from psychosis?

A In my opinion, he's not psychotic at this time, no.

Q Not psychotic. The way I understand it is that he's impulsive, but he's doing more or less what he wants to do, isn't that right?

A Well, again. Impulsive means that we are responding to our own urges and desires without reflection, without consideration for the consequences. So that's what impulsive means. It comes from inside him.

Q He doesn't really care about his fellow man or anybody around him. He's interested in Number One. Would that be fair to say that?

A I think it is fair. He just doesn't have the ability to understand other people in that way and understand the world in that way. He's focused on himself pretty much from one moment to the next.

Q What test did you perform on him?

A I administered the Ammons Test, the Memory for Designs Test, and the Vineland Social Maturity Scale in addition to the interview I conducted.

[596] Q Doctor, do you have those Austin—I'm sorry—the Rusk Records there?

A Yes.

Q I'm looking at, I guess, a diagnostic type sheet. I'll show you the sheet, so maybe you can find it. I've marked it up.

A Okay. Yes.

Q Is that when he was released, Doctor? Can you tell whether that was when he was released?

A I'm pretty sure this was when he was released, because this was a comprehensive treatment plan that was made up for him after they did an evaluation there on the ward.

Q What was his diagnosis from Rusk at the time he was released? Probably the next page.

A Mental Retardation, Borderline.

Q Does that indicate to you that the people that examined him at Rusk and had him up there for some ninety some odd days thought that it was right on the line, if at all mental retardation, it was borderline.

A The borderline range usually means an IQ between 60 and 70, so they probably felt that he was functioning in that range at that time.

Q I notice on the same page there it says—there [597] are some five items itemized out as strengths.

A Yes.

Q (1) Ability to care for your own physical needs. I assume that he can do that rather well.

A Yes, he can groom himself, and take care of his toilet needs, and feed himself, that kind of things.

Q (5) Participates with enthusiasm in planned recreational activities. Both of these things deal with what Johnny Penry would want to do and what would make Johnny Penry happy, is the way I interpret it. And then on the other side, was Weaknesses: Poor impulse control. There again, would that seem to all be more or less related in the way he functions toward other people and toward society?

A I think so. I think those are important factors, both of them.

Q Would you look at the progress record in the Rusk Records?

A Okay.

Q The first one I'm looking at shows a date of 12-1-'73, the first entry. I think these are at the back of the chart. Maybe we should go to the back first. We might make some sense [598] out of it. I think the first progress record at least in chronological order would be dated 10-3. Do you see that one at all?

A All right.

Q I'm not sure how those record are. The next page going deeper into the file, I'm not sure what to call this page.

A It's probably some kind of evaluation or diagnostic summary.

Q It says "interview evaluation", I believe, up in the top left-hand corner.

A All right.

Q On the one that you have there on the narrative summary, it says: "Johnny was cooperative, coherent, and verbal throughout interview. Intellect is subnormal (estimated to be mild to moderate). Past social history of this patient is descriptive of—maybe you can help me out there—extreme—

A I would say extremely distorted developmental sequence.

Q There is no evidence of current confused thought processes. Insight and judgment are poor.

A Yes.

Q Then on the progress record, Doctor, beginning on [599] 10-8-'73, is the first page, going back the other way. Do you find that entry of 10-8-'73?

A Yes.

Q He was placed on twenty-four restriction—and I'm going to drop about half that sentence off there. It refers to the part of the hospital that he was placed in—but it says: "in an attempt to modify his socially unacceptable behavior of setting fire to other patients."

A Yes.

Q Then on 10-14-'73 on the next page in the middle part of it: "restricted twenty-four hours again" and it says: "in an attempt to modify his socially unacceptable behavior of disobedience and 'jabbing' broom handles in window glass. Was warned about this several times." The next page, 10-17: "Johnny is restricted twenty-four hours from all social activities . . . in an attempt to modify his socially unacceptable behavior of fighting." And on 10-22: "restricted again twenty-four hours.

Scuffling with another patient." That was at 5:45 and then at 6:40 P.M. "restricted twenty-four additional hours for slipping in office and stealing a new package of cigarettes. Attempt to modify his socially unacceptable [600] behavior of stealing." The next page: "Johnny Penry is being placed on twenty-four hour restriction . . . in an attempt to restrict his unacceptable behavior". I don't think it even specifies there what his behavior was on that date. But then on 11-9-'73, the same page: "Johnny is a constant problem on the adolescent unit due to his sexual behavior with the younger boys. I have tried to take his something, if he didn't do better." Then on 11-12 he was granted a five day—

A Leave of absence. L.O.A.

Q Leave of absence due to progress, I guess, behavior. Then on 11-17, "Johnny has gone on a four-day pass. Aunt. Appeared happy about going home for a few days." Then four days later on 11-21: "Patient returned to ward at ten till ten P.M. by aunt. Said patient ran away this A.M. Reason she was late." 11-23: "This patient was caught in back dormitory along with two other adolescents beating on another boy from the adolescent unit. Attendants were notified what was going on. All three were placed in seclusion. Supervisor notified. Seclusion order given. It was reported that this had been going [601] and nothing has or had been done about it." Then on the next page, it's just got some times on it. It says 10:30 at the top: "Penry with a box of matches, striking them and throwing them in seclusion room with other patients." Then on the next page, I guess that's 12-1-'73: "Patient outside and throwing—some kind of—balls at other patients. Was told to stop. He kept on and finally hit another patient in the eye. Placed on twenty-four hour restriction." Then on 12-6 on the same page: "Johnny appears to have improved none, if not worse. He has to be watched constantly, because of his interest in starting fires, sexual behavior, other boys picking on him.—some kind of risk."

A U.D. risk. Means unauthorized departure risk.

Q Okay. In other words, he's an escape risk?

A Yes.

Q It doesn't show too much of other boy's jumping on him as much as he's jumping on them, apparently.

A Of course, that's true, but, of course, the notes are about him, not about what other boys do to him unless it affects him very directly.

[602] Q I think you made some point on the fact that in effect, at least the way I understood it, you said that you couldn't tell when he was telling the truth.

A I think it's very difficult.

Q And that would be a problem with his attorney, likewise?

A I think so. Yes.

Q Wouldn't that be a problem with any of us? If you interviewed me and I just decided to start lying to you, well, wouldn't that be a problem in that instance also? Or if you were my attorney and I just decided to lie to you? That's under my control and not your control, is what I'm saying?

A Of course, lying to an attorney is always, makes it difficult for the attorney to represent, but in this case I think we're talking about something other than just lying.

Q But you can't tell if he's telling the truth. The truth of the matter is you can't tell if a lot of normal people quote-unquote Normal, that is when they're telling the truth, can you?

A Yes, especially in this particular area. We have a lot of problems with that.

[603] Q So, what I'm really saying, Doctor, is that that's not necessarily limited to mentally retarded people. There are a lot of people that are not retarded at all that are just liars.

A Yes, it's just that the more intelligent you are, the better liar you are.

Q Are you saying that any liar would be incompetent to stand trial?

A No, I wouldn't say that.

Q That first prong of the competency test refers to his ability to talk to his attorney, and I assume that's what you went off on. In your opinion, he doesn't even have the ability?

A No, I think he's able to some degree to talk to his attorney.

Q He's got the ability, but he may not do it, is that what you're saying?

A That's right or may not do it properly or may not do it with a complete understanding.

Q In other words, our competency test doesn't say that a man can be found incompetent just because he elects, you know, to be hard to get along with or he elects to lie to his lawyer or he elects to mislead his lawyer.

A That's right. If it's volitional or if it's [604] willful, then that's no defense.

Q Well, then are you saying he does not have the ability to consult with his lawyers?

A I don't think he has the ability to consult in any reasonable way, no.

Q In other words, you don't think he can relate facts surrounding the crime of which he is charged and things of that nature to any kind of rational understanding or—

A He couldn't do it consistently. He couldn't do it without being influenced from one time to the next. He couldn't do it without being mislead or possibly mislead or having his ideas colored by what he's heard in the last five minutes. It's not that he's unable to relate facts as he knows them. But his idea of what the facts are and his understanding of them will just vary from one moment to the next.

Q Do you have the tests with you that you performed?

A Yes. It's all here in the file.

Q I'd like to allow co-counsel to look at it just a moment. In the interest of time, I'll go ahead and continue my questioning. Based on what you just said about his ability to relate prior [605] events and things of that nature, would that be contrary or would it be contrary to your findings in regard to this patient. If he had related a rather detailed story of which a lot of the facts he was the only one to have knowledge of it, that later on proved to be true, but it was after the fact that some of these things were discovered. But in any respect, he related a rather detailed story on October 25th of last year, and then came into Court today and spent two hours on that witness stand and during that period of time, related a good portion of that over again almost exactly—well, not exactly, but within reasonable accuracy as the same way be related it on October 25th, 1979. Would that be contrary to your findings?

A No. Again, I think it's important that one of the ways you might be able to tell that he's talking about the facts is the consistency with which he relates a certain fact. If he says the same thing happened over and over again, then that's a fairly good test of whether or not it's reliable. The problem is is that as you try to talk with him how do you know which version [606] to believe, if he's telling you several different versions. And a consistent version like you're telling me right now, is fine and that would lead you to think that that's the way it happened. However, what if he also tells you another version two or three times that's different from that. How do you then evaluate what's happening here. That's the problem that I think you run into with this man.

Q Did you state that—did he ever tell you that he didn't know what his rights were?

A He couldn't tell me what his rights were.

Q Did you ask him?

A Yes.

Q What did he say?

A He said, "I don't know. I don't know what that is."

Q Would that have surprised you to find out that from that witness stand under oath he told this jury that in response to a similar type question he said, "Well, the only thing I can remember is that I have a right to remain silent and anything I said could be used in court against me."

A Well, again in the context of knowing that those are his rights, I'm still not sure that [607] he knows what those are. Again, he can remember what he was told. Now that's not the same as understanding what you were told. In other words, he can remember that someone walks in or out of a door, but he might not know what it means if someone walks in or out of a door. If that person's a deputy or if that person is a DA or if that person is his attorney, you see, it has different meanings. And that's the problem with this man, not that he can't recite things that he remembers, because he can remember things, certain things.

Q Our criminal laws are such, I think, everybody, laymen alike, understand that no police officer walks up to anybody that he's required by law to read his rights to and asks him first, "now do you know what your rights are?" because I would venture to say virtually everybody out on the street would say "I don't know what they are, except what I might remember from Perry Mason or something on TV."

A Yes. I'm sure that's—

Q So the object is the peace officer reads them to him first, and generally explains them. Would that make a difference? Do you think he [608] just flat couldn't ever understand, if you told him, "Hey, you've got a right to be quiet. You don't have to say anything. You don't think he could understand that?"

A I think he would right then. And I think an hour later if you asked him, he wouldn't remember that.

Q Did you inquire of him what his opinion or idea was as to what a Court is and what a lawyer is?

A Yes.

Q And what was his opinion?

A He has no idea, except the most simple—like he can associate faces. Like he knows what the judge looks like and he knows how he's dressed usually, but he doesn't know what he does. He has no idea what the judge does here.

Q What about a lawyer?

A His lawyer is there to help him. That's about all he knows.

Q Which is basically true?

A Yes, I hope it is.

Q What kind of background information did you have prior to examining this Defendant to explain to you what he had done or anything of that—

A Yes, I had again, the records that we reviewed [609] here, also some additional records, including a statement about the offense or the time of the offense. Yes, I had that available.

Q You had one or two statements?

A I believe I only had one. It's several typewritten pages.

Q Do you have it with you?

A Yes, it's in the folder that I put down there.

BY MR. WRIGHT: If I can help, let it show that I gave him the statement taken by Maurice Cook. I just misplaced the other one, but I think it includes that.

(Mr. Price Continuing) And did you ask him about the facts as set forth in that statement?

A Yes, I did.

Q And did his version vary from those facts?

A Yes.

Q Significantly?

A Yes.

Q To the point of denying the commission of any criminal act?

A Yes.

Q So, in effect, what he told you he denied ever committing anything or at least in that—

[610] A I'm sorry. That's not quite clear enough. He was able to describe some things that are consistent and other things were inconsistent, including whether or not he committed the offenses, at least the first time I talked to him.

Q Okay. Well, did he deny it?

A Yes, he did, the first time I talked to him about it. Yes.

Q Well, did he back up off it the second time?

A Yes, he changed his mind. And gave me another version later.

Q Was that version consistent or contrary to the statement that you had to go by?

A As far as I can recall, it was reasonably consistent, yes.

Q Did you recall in that statement several sentences if not paragraphs, dealing with his activities some two or three weeks prior to the commission of this crime with which he is charged, dealing with going with a man by the name of Harold over to a lady's house and carrying a stove and a, I believe, a freezer, making a trip to Reuter's. Do you recall reading that in the statement?

A Yes, I do.

[611] Q Did he relate that sequence to you?

A Well, here's the way that happened. We did talk about those details, except he did not relate to me those details. I had to ask him if he did those things, and he said, "Yeah, I remember doing that. Yeah, I did that." That's the way it went down.

Q In other words, you didn't just say do you remember Harold and just kind of let him tell his story?

A No. He couldn't do that. He was—I had to ask him specific things. Did you do this? Did you do that?

And then he started recalling some things and then he was able to fill in some detail.

Q Would it surprise you to find out that he told this jury pretty well a lot of those things in detail without a lot of prompting?

A I think he would be able to, since he told me a good number of them.

Q But with some effort, he is able to consult with you to some extent at least, anyway.

A Well, recall that immediately prior to that testimony he had been talking with me about the very same thing in that room right there, so this [612] was just after lunch, that we talked about that particular thing.

Q Were his first words to the effect that his friend, David Finch, was the one that actually committed the crime?

A Yes.

Q Do you find that uncommon among people that are facing serious criminal charges that they might lie to their lawyer or to the doctor or to anybody else about what their involvement is in these criminal activities?

A No, that happens a lot.

Q These tests that you performed that you mentioned, Doctor, they are not totally objective. I mean you've got to apply your interpretation to them, don't you?

A Most of the time that's true, yes.

Q And it would be possible for another psychologist to go in and examine this defendant and perform the same tests, and maybe come out with a different conclusion.

A I think it might be, yes.

Q And in this particular instance especially, because isn't it a fact that even your opinion it is a borderline case, even though you have said [613] in your opinion that he is incompetent. But, it's just not all that solid an opinion, is it?

A No, he's not that solidly or that obviously defective or mentally incompetent. There are some people that it's

just clear. There's no—even to a layman. In this particular case, he does have certain strengths. He has certain assets, and it makes it more difficult to clearly determine this. And you've really got to scrutinize his thinking and his understanding of the world very carefully before I think a judgment can be made. It's hard.

Q Doctor, the fact that you tested him today for the first time this morning just before his appearance in Court here in the process or you might say in the midst of a judicial proceeding and then again at noon in the midst of a judicial proceeding with him having these criminal charges pending against him and the environment of being in the jail, do you think that could effect his or the accuracy of these tests?

A There is no doubt that his situation has an influence on him. There is no doubt that it has more of an influence on him than the average [614] person, because of what I've talked about earlier. I'm sure he is definitely effected by the surroundings of what is happening here. It is hard to evaluate in what way he might be effected. Again, Johnny is generally eager to please, especially someone who is more sophisticated or is in some kind of authority. I think that desire to please, that desire to get along and try to give the right answers, effects his judgment greatly about what he says and what he does. How that effects the particular evaluation in this case, I'm not clear. I think he was trying to do his best. That's all I can tell you about that. I think that he was trying to do as well as he could. It's true. He did try to deceive me. His attempts to deceive are pathetic. They are patently absurd, which again. In other words, he's a very, very bad liar. And, so, I think this all has to be taken into account, when you are trying to evaluate what we're dealing with here. That's all I can say.

Q Basically, what my question was though, as far as the accuracy of these tests, you've given him these tests,

which require some subjective, I [615] guess, interpretation, and he's taken these tests in a jail over there, just before going into a judicial proceeding, and again at the noon hour, just before going back into one. Do you think that environment and the pressure of being in a trial situation and in everything, could influence the accuracy of those tests any?

A I think it must, but again, I don't know of another situation that would be more amenable to be more accurate. In other words, the question is what situation could we put this man in that he would do better or that he would show his true self. It seems to me that we get as accurate a picture of who this man is under the stress of the courtroom at least for the purpose of the question that we're trying to answer here today. As much as anything—

Q You don't think testing in a hospital situation would be better?

A In this particular case, I think what we obtained is as good as anything.

Q Being in a hospital and away from this and away from the pressure of a pending trial wouldn't help or hurt one way or the other?

A Well, again, we're trying to assess his [616] ability to face a trial, his ability to handle a trial, so what better judgment can we make than a person who's really facing it. I think this is real for this man. We have to look at what's real for him.

Q Are you saying then that his ability to face a trial—you are saying that this is better to test him now in a trial situation than say three or four months ago when he wasn't under the stress of actually being in a trial situation?

A Well, he should do better without any stress around, but again, if he's under stress and this is a real trial situation, then how he's really able to handle it is the real test.

Q Well, in fact, almost any defendant in a criminal proceedings, wouldn't you say doctor, he's going to test out a little different, if you caught him either just before he goes to trial or while he is in trial and test him as opposed to testing him six months out, when he's not as concerned with the immediacy of the trial?

A I think so. Sure.

Q And the advance testing, wouldn't it be more accurate as to his true mental condition?

A No, I think it would just be an indication of [617] how he's able to function without stress.

Q Well, everybody would be under stress in a trial situation. Everybody I assume would be depressed if they were charged with a serious crime.

A That's right.

Q Who contacted you to come down and test this defendant?

A Mr. Wright.

Q Do you charge for your services?

A Yes.

Q Who guaranteed payment?

A I understand—well, Mr. Wright, himself, guaranteed that I would be paid by the State for my services.

Q That's nice of Mr. Wright, isn't it?

A Yes, I hope he's accurate.

Q Have you been paid to testify in other criminal trials?

A Yes.

Q Have you agreed or have you, in fact, tested this defendant for any sanity issues?

A No, I haven't.

Q Have you discussed that with Mr. Wright?

A Not specifically. I can't recall the [618] conversation. There was some mention of the issue of sanity, but that certainly was not my understanding that that's why I was coming here today. My understanding was with regard to the issue of competency.

Q Would it be fair to say that competency in a legal sense or as you've been giving you opinion related to it, deals a lot with communication?

A Yes, it does.

Q And environment also?

A I think that's critical, yes.

Q Pass the witness.

BY THE COURT: Do you have any more questions, Mr. Wright?

BY MR. WRIGHT: Yes, I do.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q There was some questioning earlier about his impulsiveness. There was some suggestion that maybe he just doesn't care about others. I'm going to ask you this, again. You're still sure that his intelligence is lower than 99 out of a hundred average people, aren't you?

A It's very low, very poor.

[619] Q All right. And you regard as a probable reason for that is organic brain damage, is that true?

A I think so, yes.

Q All right. Isn't that the root cause of this kind of lack of control?

A I believe it's the cause of why he can't learn or profit by his mistakes. He keeps making the same mistake over and over again.

Q So there is something that most of us have that he doesn't have, which is IQ, isn't that correct?

A Yes, he can't learn or get inside his mind the rules for living that the rest of us know about to control our behavior.

Q All right. Mr. Price has gone through a number of incidents that were documented in his medical records, homosexuality alleged, arson, miscellaneous items of mischief, petty theft, and running away. Now, is any of

that just totally repugnant to the idea of organic brain damage and a 1 percentile IQ?

A No, these behaviors are characteristic of people with this problem.

Q So, there's not—so you can't prove just on the fact that he's exhibited some of this kind of [620] conduct that he's just mean and immoral, can you?

A No, I think that's a reflection of his basic difficulties. That's the kind of behavior he engages in because he's so disturbed and damaged.

Q All right. Now, if Mr. Penry were lead to make a statement, regardless of whether it's true or false, at one time, do you think it would be difficult to lead him again to make the same statement?

A I think you could lead him again to make that statement. You could lead him again to make another statement, depending on how you word and what he gets that you want to hear from him.

Q All right. So, is there any particular significance to the number of times he can be brought up here and lead to say the very same thing?

A No, I don't—again, it depends on the amount of leading that's done. He'll tell you whatever story that he thinks is the right thing to say at that moment.

[621] Q There was some cross examination here about just plain old lying and you said, I believe, something to the effect that while there's more here than just plain old lying. Would you elaborate on that, if you can?

A Well, what I mean is that his attempts—well, the versions of the stores or the facts that he gives are based on other things than just the willful attempt to deceive somebody. Again, his liking for the person influences him. The degree of stress he's under. Whether or not he's talked to somebody in the past that tells you to watch out for this person that you're talking to. The degree of threat that he feels. Whether or not he thinks that you're his friend or his enemy. All these things color his judgment and will influence his judgment from

one time to the next as to why he tells a certain version versus another version. The idea that he is simply lying just to cover up or to protect himself is only one of many factors that influence his judgment. The problem is that there is so many things that influences his judgment that he is unable to discriminate like normal people are able to do that all you get is this [622] confused, inconsistent recitation from one time to the next, and over a period of time, all you get out of this is confusion. You don't know what to believe.

Q In the midst of this confusion, if you could find one central consistent statement that was to him, would it be consistent with your opinion to find that that statement was drilled into him by repetition, repetition, repetition, sometime earlier?

A No, that wouldn't be inconsistent

Q In other words, if he— tells a consistent story, it may well be very well because it's been drummed into him?

A That's right.

Q Pass the witness.

BY THE COURT: Mr. Price, do you have any more questions?

BY MR. PRICE: I sure do.

RE-CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Doctor, I notice Mr. Wright says lead to make a statement. He can make a statement without leading him, can't he?

A That's right. He can.

[623] (State's Exhibits Two and Three Marked for Identification)

(Mr. Price Continuing) What if he made that statement over again without any leading other than the fact of zeroing in on the date or the time or something

of that nature, just to get him started, and just let him tell it.

A I think again, the more open ended the questions are, the more probable it is that the facts that you are getting are reliable, but the type of questioning, again, is very important here.

Q Mr. Wright, I assume he was talking about these statements, and I've marked State's Exhibits Two and Three, as being drummed into his head and that he learned it. As I understand it, he's got a very low IQ, and now we've switched over and he's memorizing these statements. I'm going to show you State's Exhibit Number Two.

(OBJECTION)

BY MR. NEWMAN: If the Court please, we object to that form of question. It's in the nature of an argument about—it's not evidence and highly improper. I request the Court to instruct the jury not [624] to consider it and instruct the attorney—

BY THE COURT: Sustain the objection, Mr. Newman. Disregard the last statement of counsel. Rephrase your question, counsel.

(Mr. Price Continuing) Assuming that that State's Exhibit Number Two that you are looking at, Doctor, is a statement by this Defendant, given within a matter of three or four hours, I'm not sure of the starting and ending time on that statement. I believe it's got a time up here. Beginning at 3:25 P.M. and ending at 6:05, so you're talking about what—about two and a half hours?

A Yes.

Q Do you think this Defendant has got the IQ and the mental ability to memorize that statement and be able to recite it back more or less verbatim?

A No, I don't think he—

Q In that length of time?

A I don't think he has that ability.

Q And then the next day, if he gave the statement that's been marked as State's Exhibit Number Three, which I believe you've seen, haven't you Doctor?

[625] A Yes, I've seen this.

Q In a matter of six or eight hours, all of which was within less than thirty hours after he was in custody, do you think, that there again, that could be drummed into him, where he could remember that and come into this courtroom five months later and sit on that witness stand and relate facts out of it?

A Not in any detail. Not in considerable detail, no.

Q You're talking about lead him to make a statement, I guess what you're saying is anybody could type up a statement and get him one way or the other to sign it?

A Yes, I think that's possible.

Q But that wouldn't be his words, would it, Doctor?

A Right.

Q You said he was a pathetic liar and he would be caught up in that later on, if he tried to relate that story again?

A I think so.

Q Pass the witness.

[626] RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Now, Dr. Brown if—let's assume that on one day throughout three hours, a statement is obtained from Mr. Penry, and this statement is taken before several people. And then the following day another statement is taken and one or more of the people, who were present when the first statement was taken, are also present and there to ask questions for the second statement. Now, can those people that were present, do you think, lead him to make a statement strikingly similar to the first?

A Yes, that's possible sure.

Q Pass the witness.

BY THE COURT: Do you have any more questions, counsel?

BY MR. PRICE: Just a couple, Your Honor.

RE-CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q The impulsiveness that this defendant suffers from or whatever the proper title is as well as any mental defects that you've ascertained, don't these actually bear more on the legal test [627] for the defense of insanity as opposed to the question of competency?

A Well, the impulsiveness is important, because we're talking about his ability to follow at a plan. Like if you give him an instruction and tell him to do it this way, he is so impulsive that it would be difficult for him to do that if his urges or desires or the pressures of the moment were contrary to that. So, that's why impulsive is important here. He can't sustain a position. He can't sustain a plan of action over any period of time. He loses it. He breaks down.

Q How does that effect him with his lawyer in the trial of a criminal case?

A I think it would be very difficult for his attorney to give him an instruction to do something or to think about something or to follow a plan, and him carry it out with any length of time.

Q An instruction such as what?

A Don't talk to anyone about the case except me.

Q Okay, What else?

A When the doctor talks to you, tell him the truth.

Q And when I put you on the witness stand, tell it [628] this way or that way.

A Yes.

Q Would that be the same thing?

A Yes.

Q He caught up in that too?

A Yes.

Q But these do pertain to also the issue of insanity, which is a separate issue altogether?

A They are relevant to the issue of insanity also. Sure.

Q Are you aware that the defense of insanity can be raised upon the actual trial of the case by a Defendant, irregardless of his competency? I mean, this is a separate matter totally separate and apart from the sanity issue.

A Yes, it is.

Q The fact that, you know, he was found competent wouldn't preclude the raising of an insanity issue for that matter. Even if this jury found him competent, it wouldn't stop him from raising the insanity issue later on.

A Of course, that's a matter of law, but it's my understanding that it's true. Yes.

Q The case that you and I had some dealing with before, in that particular instance—

[628A] (OBJECTION)

BY MR. NEWMAN: If the Court please, let's approach the bench. (Attorneys Approach the Bench) (In the Record, Out of Jury's Hearing)

BY MR. NEWMAN: We are objecting and this jury well knows about the Tullos trial that Mr. Price keeps alluding to.

BY THE COURT: I don't see that it is relevant on this issue. Now, if you are going to be much longer, Mr. Price, we will adjourn and let the jury come back tomorrow.

BY THE COURT: The objection is sustained. And ladies and gentlemen of the jury, you are instructed to disregard the last question of counsel.

[629] (Mr. Price Continuing) Pass the witness.

BY THE COURT: Mr. Wright—

BY MR. WRIGHT: I have just a couple of very brief questions.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q In our conversation regarding this case, have you detected any plan on my part or Mr. Newman's part to tell this jury anything but the truth?

A The jury?

Q Well, to tell anybody anything but the truth.

A Well, I have no indication of that. My main contact is with Mr. Penry, and my experience has indicated that you have tried to urge him to tell me the truth.

Q All right. What—The reason I asked the question was there was some reference to some plan that the lawyers might have with a difference that maybe we are trying to concoct something that's not true. Now, have you detected anything like that?

A No, there's nothing about that.

Q All right. Pass the witness.

* * * *

**TESTIMONY AT THE TRIAL ON THE MERITS
CONTAINED IN VOLUME 16 OF THE
STATEMENT OF FACTS OF THE TRIAL**

* * *

[2114] JOSE G. GARCIA

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your name for the record, please?

[2115] A My name is Jose J-O-S-E, middle initial G., Garcia G-A-R-C-I-A.

Q And what is your profession, please?

A I am a physician.

Q Do you have any particular specialty?

A I do.

Q And what is that, please?

A Psychiatry.

Q And how long have you been engaged as a psychiatrist, Doctor?

A Since approximately January 2, 1960.

Q All right. Did you have to go through an extensive course of study in order to become a psychiatrist?

A I did.

Q Would you please give us a history of the course of study that you undertook in order to become a psychiatrist?

A I will. I completed my medical training at the University of Nuevo N-U-E-V-O Leon L-E-O-N in Monterrey, Mexico in December, 1957; subsequent to that I spent six months.

Q Excuse me, Doctor. Let me stop you. Where did you do your undergraduate work?

A In Mexico, University of Nuevo Leon.

Q And also, where did you go to high school?

[2116] A Well, in my home town of Nuevo Laredo, Mexico and went to Medical School in Monterrey, Mexico, graduated in December of 1957.

Q Continue.

A I came to this country in January of 1958 and served a preceptorship in psychiatry with George A. Constant C-O-N-S-T-A-N-T, a psychiatrist in Victoria, Texas for the first six months of 1958. Subsequent to that I served a full rotating internship for one year at Providence Hospital in Waco, Texas. I returned to Mexico and served six months of rural internship requirement for my National Board Licensure in Mexico from July to December 1959. I began my training in psychiatry in January 2, 1960 at the Warren State Hospital in Warren, Pennsylvania and left there at the end of June, 1961, came to the Austin State Hospital in Austin, Texas, where I took two more years of training, terminating my full training in June of 1963. I was in private practice of psychiatry at Victoria, Texas from July 1963 until July 1969, at which time I was called into active duty with the United States Army. I served with the United States Army for two years in active duty with [2117] the medical corps in Fort Dix, New Jersey. I returned to Texas in July, 1971 and became a staff psychiatrist with the Veteran's Administration Hospital where I became director of residency training for the Baylor Graduate Students and Residents physicians from 1972 until 1977. In addition, I became a consultant for the Harris County Forensic Psychiatry Unit from 1974 until 1978. I became a member of the faculty of Baylor College of Medicine, where I hold the rank of assistant professor of psychiatry even until this day, and I'm director of training forensic psychiatry for Baylor College of Medicine. In addition I have attained the rank

of lieutenant colonel in the Texas National Guard, where I am the brigade surgeon for the 36th Airborne Brigade. In addition, I have completed approximately 6/8 Ths of the curriculum to be an attorney at the University of Houston College of Law. I'm chief of mental health services for the Texas Department of Corrections and have held that position since April 1979, and I have just resigned the position effective March 31. In addition, I also have a private practice of [2118] psychiatry in Harris County, Texas.

Q Is that all?

A I think.

Q Have you written any articles?

A I have.

Q Would you give us a description of those?

A I've written several articles. Most of them have to do with the application of law in medicine and law in psychiatry. I have written an article on the legal and ethical problems of the use of narcoanalysis in criminal law. I have written articles and given many lectures in the area of psychopharmacology. I'm also founder of the Southwestern Institute of Correction and Forensic Science, which is a new institution that was just born officially a month ago. It's designed for the training and further development of people in forensic sciences and corrections. In addition, I have written articles in the area of teaching forensic psychiatry seminars, and I have continued to have affiliation with teaching institutions like University of Texas, San Antonio. In addition, I teach as a visiting lecturer at [2119] the University of Houston College of Law.

Q Doctor, have you had an opportunity to examine Johnny Paul Penry, the Defendant in this case?

A I have.

Q When did you first have this opportunity, doctor?

A If I may, it's in the record. I examined him on the 25th of February, 1980.

Q All right. What did you have in mind when you went to examine him? What was the purpose of your examination?

A Well, I had been requested by you to conduct a forensic examination and to give an opinion on the issue of competency to stand trial and sanity at the time of the alleged offense he was accused of having committed.

Q Now, you have then interviewed Mr. Penry on just one occasion or more than one occasion?

A One occasion.

Q All right. And how long did you visit with Mr. Penry at that time?

A Approximately two hours.

Q Prior to the time that I engaged you to make this examination, did you give me any kind of warning with regard to—

(OBJECTION)

BY MR. PRICE: I'm going to [2120] object to this, Your Honor, as self-serving. I assume that's what counsel is driving at, some sort of self-serving declaration.

BY THE COURT: Sustain the objection.

BY MR. NEWMAN: May we have the jury retired, so we can make a Bill.

(OFF RECORD)

BY THE COURT: Would y'all approach the bench just a moment, and let's make sure that's the answer.

(Attorneys approach the bench)

(Mr. Wright Continuing) We'll withdraw the earlier question. Prior to the time you examined Mr. Penry, had you formed any opinion concerning his mental condition?

A No, I did not.

Q In addition to your examination of Mr. Penry, did you take any other steps with regard to obtaining information about him?

A I did.

Q Would you briefly describe what you did?

Q Well, I requested you to provide me with every available medical record that could be [2121] obtained, that would give in detail information about his past, medical, psychological and psychiatric history. And I also requested you to obtain a battery of psychological tests that will give us some current information as to his present intellectual performance.

Q All right. And were you provided with any medical records from the Child and Adolescent Psychiatric Unit of the University of Texas Medical Branch at Galveston, Texas?

A I was.

Q Were you provided with any medical records of the Mexia State School for the Mentally Retarded?

A I was.

Q Were you provided with any medical records of the Austin State Hospital in Austin, Texas?

A I was.

Q Were you provided with any medical records from the Rusk State Hospital in Rusk, Texas?

A I was.

Q Were you also provided with a psychological evaluation performed at the request of the Texas Rehabilitation Commission?

A I was.

[2122] Q And after your examination and consideration of these items—oh, also, did a psychological evaluation also occur after your request, if you know?

A I understand that to be the case. I do not have a report of that particular examination. I have not seen such a report.

Q Okay. But you are aware—well, do you know who did the psychological evaluation?

A I do.

Q And have you spoken with the person who undertook the examination since it was done?

A Only the same day that the examination was completed, and he and I exchanged some ideas, but he did not give me any total scores or any of the intellectual assessments reports which I needed to have. I guess he had not completed his scoring when he talked to me.

Q All right. Judge, at this time, pursuant to our stipulation, I will offer Defendant's Exhibit Seven from the Austin State Hospital, Defendant's Exhibit Number Six from the Rusk State Hospital, Exhibit Number Four from the Austin State School, Number Three from the Mexia State School, and if I'm not mistaken, [2123] the Clerk has a packet of materials that came from Galveston, is that true? I'll ask that these be marked.

(Defendant's Exhibit Number Eight Marked for Identification)

BY THE COURT: Now, you're offering Defendant's Exhibits 3, 4, 6, 7, and 8?

BY MR. WRIGHT: That's correct.

BY THE COURT: Have y'all had an opportunity to look over these?

BY MR. NEWMAN: That's by stipulation, isn't it?

BY MR. PRICE: I just want to be sure it's all there. We don't care about it being introduced. I just want to be sure it's all introduced.

(Defendant's Exhibits Numbers Three, Four, Six, Seven, and Eight Offered in Evidence)

BY THE COURT: All right. There's no objection?

BY MR. PRICE: We'd like to [2124] have all the records put in, Your Honor. We understand counsel is holding back some of them.

BY MR. NEWMAN: We object to the statement that we're holding back something.

BY MR. PRICE: He just told me, Mr. Newman, that he's got them right there.

BY THE COURT: Mr. Price and Mr. Newman, just a moment. Keep your remarks to the Court.

BY MR. PRICE: I'm sorry.

BY THE COURT: Let me see those.* All right. Is there any objection to Defendant's Exhibits 3, 4, 6, 7, and 8?

* BY MR. NEWMAN: Under the stipulation they—introduce whatever they want to—what is it you want?—Why don't we retire the jury to get this stuff tied down.

BY MR. PRICE: Judge, just for purposes of the record, I thought our stipulation was to the fact that all of his records were coming in. We don't have any objection to those. We would just like to see them all introduced.

BY THE COURT: All right.
[2125] Defendant's Exhibits 3, 4, 6, 7, and 8 are admitted without objection.

(Defendant's Exhibits Numbers 3, 4, 6, 7, and 8 are Admitted in Evidence)

(Mr. Wright Continuing) I'll hand you now Defendant's Exhibit Numbers Seven, Eight, Three, Five, and Six, and I'll ask you if you've had an opportunity to go over these records at some time in the past?

A Yes. Yes, I have.

BY MR. KEESHAN: May I approach the bench, Your Honor.

(OFF RECORD)

BY THE COURT: Yes, sir.

(Attorney approaches the bench)

BY THE COURT: All right. You can proceed.

BY MR. WRIGHT: Judge, I'd request about a fifteen minute recess.

BY THE COURT: Come here just a moment, Mr. Wright. What's—

(OFF RECORD)

(Attorneys before the bench)

BY THE COURT: Ladies and [2126] gentlemen of the jury at this time, we'll recess for fifteen minutes. Again you're admonished not to discuss the case among yourselves or with anyone else. If anyone attempts to discuss it with you, you're to report to me. Y'all can be excused.

(Court recessed for fifteen minutes)

(Mr. Wright Continuing) Dr. Garcia, I'm going to hand you Defendant's Exhibit Number Eight, which I believe is from the Child and Adolescent Psychiatric Unit of the University of Texas Medical Branch down at Galveston, and I'll ask you now. Have you had a chance to look over those adequately?

A Yes, I have

Q All right. And, have you used those records in connection with your examination of Johnny Paul Penry?

A I used them as part of the information that I requested from you for developing a basis and foundation for my opinion.

Q All right. And Defendant's Exhibit Number Seven, the Austin State Hospital records, have you had [2127] an opportunity to examine those records adequately?

A Yes, I have. They are the ones when Mr. Penry was committed to the State Hospital by Judge Pat Gregory in Harris County?

Q I think we possibly got that one out of chronological order, but be that as it may, go ahead and lay that one down. I'll present you now with Defendant's exhibit number Three from the Mexia State School. Have you had an opportunity to examine that adequately?

A Yes.

BY MR. PRICE: What's the one he's looking at now?

BY MR. GARCIA: Mexia State School.

BY MR. PRICE: What's the number on it?

BY MR. WRIGHT: Number Three.

(Mr. Wright Continuing) I'll present you now with Defendant's Number Six, which I believe is from the

Rusk State Hospital in Rusk, Texas, and ask you if you've had a chance to go over those records adequately?

A Yes.

Q All right. I believe you got those just this [2128] afternoon, didn't you?

A Just before noon.

(State's Exhibit Number Nine Marked for Identification)

Q I'll hand you what's been marked as Defendant's Exhibit Number Nine and ask you if you've had a chance to look at that adequately?

A Yes, it was provided to me several weeks ago, but I did not receive a copy so I could continue to look at it, but I recall having examined this particular document.

Q You got it from me, is that correct?

A True.

Q Defendant's Exhibit Number Four, I'll hand you now, appears to be a transmission from the Medical Branch to the Austin State School. Have you had an opportunity to look at that adequately?

A Yes, in fact, I'm sure I have a copy of this in my files.

Q Now, doctor, from all the information that you have before you, are you able to form an opinion concerning the mental condition of Johnny Paul Penry?

A Yes.

[2129] Q And also based on your examination?

A Yes.

Q All right, sir. Tell the jury what your opinion is with regard to whether or not he is legally sane or insane.

A I am of the opinion that, although I can not address my opinion as to the condition today, but I am of the opinion that at the time of the offense charged, he was suffering from mental defect that interfered with his ability to appreciate the wrongfulness of his conduct, and that he is such an individual that is organically and

impulsively driven that he was unable to conform his conduct to the requirement of law.

Q I'm going to stop you right there. Tell the jury what you mean by organically and compulsively, is that what you said—

A Impulsively.

Q Impulsively. What do those words mean in the context that you used them?

A I'm referring to a brain disorder that affects an individuals' ability to use thinking, judgment, and volition. That is, the free will is impaired to such a degree that such a person [2130] has difficulty exercising intelligent, reasonable judgment. In addition, a person who has this type of a brain disease, brain defect, doesn't know how to learn from experience, and they, in fact, have no impulse control or extremely poor impulse control. This would be the case of a person who could if he would, excuse me—who would exercise control if he could, but he can't compared to a person who could if he would, but will not. In this particular situation, the impairment of the brain prevents the person from having the ability to exercise control, rather than a person who has the ability, but chooses not to exercise control.

Q Well, that's kind of a mouthful, doctor. Let me see if I can break that down a little bit. Could Johnny Paul Penry do better than he does?

A No.

Q Would it matter how hard he tries?

A No.

Q In other words, is it fair to say no matter how hard he might try to conform his actions to the law, he would be unable to do so?

A That is what I said.

[2131] Q Now, you may have covered this to some extent, but I'll ask you again. What is organic brain syndrome?

A That is a damage to the brain. Like a scar in the brain, that once it occurs, it never heals. It is always

impaired. There is no way known to this date how science can help a person that has a brain injury, from any reason, whether it is from an injury with a blunt instrument or whether it is an injury from drugs like alcohol or any of the different kinds of drugs or from birth, from the lack of oxygen or from having had, for example, a high infectious disease during the formative years, or it could be a case of meningitis or a severe case of chicken pox or whooping cough. They have a permanent damage to the brain that no matter how intensively or aggressively treated, it doesn't change. In other words, it is a scarring of the brain tissue that just does not get better and will not get better.

Q Now tell us, what is the basis of your opinion that he does suffer from the organic brain syndrome you've just described?

A Well, part of that has to do from the result [2132] of my examination of Mr. Penry and part of it has to do with the examinations that have been conducted by physicians, psychiatrists, psychologists, counselors, way back since 1965. That have again, and again and again, come back with almost identical reports even though they did not, the way I understand it, have access to the previous reports, when they examined him, until after the in-take examination was completed. So that the scores, the examinations, have almost have been carbon copies, so that in itself tells us that there has been almost no change or no change whatsoever since 1965. And in my examination, I found strong clinical evidence that he continues to have the same symptoms that are compatible with an organic brain disorder.

Q All right. What is this strong clinical evidence that you found in your recent examination?

A May I refer to my examinations?

Q Certainly.

A First of all, the type of language he uses is the type of language that is found in an individual who may have less than a first grade education level. The lan-

guage is rather [2133] primitive, although the language may seem understandable to everyone else. Secondly, he doesn't even know how to spell words as simple as dog and cat. When he was asked to spell the word "cat" he spelled c-a-r. And he printed. He spelled the word "dog" as saying d-i-d-y. I asked him how many days were in a week, and he said he did not know the days of the week, but when I asked him what day it was that the examination was being conducted, he said he had been told it was a Monday. The questions had to do with trying to present questions in a manner that they were understood by him. So, I asked when is pay day, because I understand that he was attempting to work and he remembered it was Saturday. And he remembered that Sunday is the day to go to church, but the other days he did not recall or knew what they were. He told me that there were four nickels in a quarter and that he attempted to sound very intelligent. When I asked him how many months were in a year, he said "most people said there were six, but I think there are more than that." How many? "There are eight." And he appeared quite sincere in giving that [2134] information. Then I asked him to give me the names of the months. He proceeded to mention February, August, July, September, November, June, and then repeated September. When I asked him why he repeated September, he had forgotten that he had already mentioned September. Then he said that that was all that he could remember. He was shown a handful of coins. Included in this was one dime, one nickel, and four pennies. He was unable to add the total amount of money that was in my hand. In addition, he had difficulty understanding abstract concepts. He had difficulty with recent recall, with remote recall. Some things were clear. Some things were not clear. In other words, it was not as if there was a particular period of time, that was fuzzy. That often is found in people charged with a criminal offense, and who intend to simulate amnesia. They forget only a period of time that is

compromising and that is called amnesia of convenience, Mr. Penry has some recollections that are clear, some that are confused, but there is not a single period of time where the memory is conveniently forgotten. So that I am of the opinion that [2135] his amnesia is not a simulated or an intentional faking of amnesia. In addition, I did have evidence that was corroborated after I'd reviewed the record, by the record of repeated episodes of beatings that were reported by other people, which are compatible with the causing of a brain injury. And in addition to that, I felt that his judgment during the examination was severely impaired. Based on that part of the examination for the history taking, plus all the other records available to me, I reached the conclusion I stated earlier.

Q Doctor, part of your examination then, involved asking him questions and seeing how he responded, isn't that true?

A Correct.

Q Isn't it possible that a person might try to deceive you and lie to you?

A Yes, it is.

Q All right. Are you of the opinion that he was lying to you and trying to deceive you in any way?

A No, I'm not.

Q Do you have any evidence that would bear on that question?

[2136] A I think I already addressed my previous answer to that question. Probably there are very few people in the State of Texas who are as familiar with the detection of malingering as myself, since I deal with that on a day to day basis, due to the fact that I'm involved in the examination of people who have been known to be experts at malingering and that's in the Texas Department of Corrections.

Q Will you tell us exactly what you mean by malingering?

A Malingering is simulation of mental disease or faking of mental disease for a secondary gain or for another purpose. That's what I call a simulation of mental illness of convenience.

Q All right. I'll refer you now to the records we obtained from the University of Texas Medical Branch down at Galveston. Do those records reflect that he was treated at the medical branch back in 1965 and 1966?

A July and August 1965 was the cover sheet and the date of this letter, May 1966.

Q All right. Have you ascertained from any of these records what the birth date of Mr. Penry was?

[2137] A Yes, sir. It's written right here. May 5, 1956.

Q So, nine or ten years old at that time?

A Approximately.

Q All right. Based on your examination of the records, there, did you—was he diagnosed as having organic brain damage at that time?

A Yes, if I may quote from the record "the replication of geometric designs were strongly indicative of a significant degree of brain damage."

Q All right.

A And the opinion or the finding was that he had "an organic brain syndrome with mental retardation and behavioral disturbance."

Q Now, Doctor Garcia, it is important, is it not to know the context in which such a diagnosis is made, isn't it?

A Usually, yes.

Q All right. So it is part of your examination of the records, is it not, to see why he had been referred down there or why he was down at the UTMB in Galveston?

A Well, the consensus and the common denominator in all of these reports was that his behavior was so uncontrollable at school and impulsive [2138] that he was not adaptable to home or school. The wording of the chief complaint was "he was seen with the chief

complaint of being uncontrollable at school, hyperactive and impulsive, and also presenting a problem of control at home." That was the referring reasons for him to go to John Sealy in 1965.

Q All right. But, you don't find anything there that he was charged with any criminal offense?

A No, I did not.

Q Or he's only nine or ten years old at that time.

A No, there was none.

Q Then, would it be fair to say that you could rule out any attempt at simulation or faking it, back at that time?

A There would have been no reason for him to fake any type of illness at that particular time. Or in addition, if there had been a desire to do so, he did not have the intellectual or social sophistication to do so. I don't know if I'm making myself clear.

Q Okay. You say he didn't. How do you know he didn't?

A Because the record doesn't indicate there was [2139] any reason, but if he had had a reason, he didn't have the mental, intellectual, or social capacity or knowledge to do so at that age.

Q All right, doctor. Aren't there also some records of observations made by a school teacher and so forth in those records?

A I believe so. I think Galveston requested the records from the previous school. In fact, they postponed seeing him until those records were provided, and there was a great deal of correspondence on that. Let me see if I can find it.

Q Doctor, was it in the form of a questionnaire?

A Yes. I found it.

Q All right. Is there any evidence in those records to suggest that at that time in his life he was pretending to be more intelligent than he was where he could?

A According to teachers, that is correct.

Q Could you tell us exactly what the evidence is in those records?

A Question: How does this child relate to you and to teachers? Answer: He listens to me when I admonish him, says he understands, but [2140] really only understands a word once in a while. That's from R. R. Green, Elementary School Principal, 4512 Highway # 3, Dickinson.

Q Does that have a date on it?

A 6-9-65. In additional comments, he says "the boy is extremely emotionally disturbed and the home situation aggravates his condition. Mother did not let child attend school after December 1."

Q In those records from Galveston, is there any other evidence in there that particularly is pertinent to the conclusions that you reached in your—

A Well, there's a note here that the first test the school performed was two years before this report by a Cameron McKinley and he scored about 60 I.Q. on test administered by Cameron McKinley. I imagine he is a school diagnostician, two years before the date of this report.

Q All right.

A And she also makes the comment with large letters. It's about the only place in the record in this report that she uses capitals. She says Does this child have any special [2141] behavior problems? What methods have the teachers used to cope with these problems? Large block letters, she says "HE IS HYPER-ACTIVE! The teacher has allowed some freedom of movement, but has had to physically restrict him. Spankings have been administered."

Q Doctor, in those same records, don't you also find some, what we call, intelligence tests normally?

A I do.

Q All right. What tests were administered and what were the results of those tests?

A Well, the test is not labeled by actual names, but I suspect that he had the Wechsler Intelligence Scale for Children. That's about the only test that gives this particular reading. It gives a verbal score, a performance score and a full scale score I.Q.

Q Will you tell us first, what those labels mean?

A A verbal score has to do with a person's ability to communicate with words. The performance has to do with how the person puts together the words with what they mean as well as the motor coordination, the hand [2142] coordination, visual coordination, the ability to use memory and reproduction for design or to draw or to be mechanically inclined, for example. Most people have a difference between the verbal and a performance I.Q. For example, a person may be a very competent typist and a person who can write very fluently, but who can not do math very well. A typical example is the husband who can or the man who can perform very complex tasks at work that involve the use of reasoning and speaking, but who cannot keep the checkbook, because he creates a problem for himself. That's the kind of reasoning that he has difficulty using. Or the person who can express himself verbally very well, but who cannot draw worth two cents, for example. The coordination for drawing is severely impaired. Normally the difference should never be more than ten points between the verbal and the performance, either way. A person may be perfectly competent as a mechanic, but his ability to communicate with words is very inadequate.

Q Let me stop you right there, doctor. What is the significance of a variation of more than [2143] ten points between the verbal score and the performance score?

A If it is more than ten points, it normally means either of two things. Either the person is severely psychotic or and this is the most common explanation, a severe degree of organic impairment of the brain. The two are possible, but the most frequently found is severe mental retardation or—excuse me, that's incorrect. Organic brain disorder.

Q Okay. What does it mean to be psychotic?

A Well, to put it in plain language means to be crazy. That means the person has no contact or limited contact with reality and their ability to relate to their environment is significantly impaired. That is different from a person who is organically impaired.

Q If we could move to the records to be found in the records from the Mexia State School, unless there is something else in there that that's particularly important that you think ought not to be overlooked?

A Well, I think that it probably should be said what the scores for the testing performed in 1965. He had a verbal score I.Q. of 72, which [2144] is within the mild range of mental retardation. The performance I.Q. of 47. That is a discrepancy of 25 points between verbal and performance. And the tables have an averaging system that in this case came out with a full scale of 56, which puts him at the moderate range of mental retardation back in 1965.

Q All right. Doctor, if you're able to say, tell us out of an average group of 100 people, how many of those people is Johnny Paul Penry smarter than? If you're able to say, from the records you've seen.

A Probably .5 or less.

Q When you say .5 do you mean out of 100 people he's smarter than only half of one person?

A Correct.

Q 99 out of 100 people and more are smarter than he is?

A Correct.

Q Now, you've looked at all of these records. Is your opinion based on all these records that you have?

A Yes.

Q All right. So is it consistent throughout?

A Yes, it is.

[2145] Q In other words, there has though been some variation in the scores that he has gotten, through the years, isn't that true?

A There hasn't been any change. If any change has occurred, it has been a matter of two or three points. In one of the tests I think that he had a full scale of 61 or something to that effect. I've forgotten where that particular record was.

Q Could it have been 63?

A In that range, yes. But I think that's about the highest he ever scored on a full scale I.Q. That still keeps him within the mentally retarded range, but instead of being at a moderate level, it's the intermediate level of retardation. It puts him at the mild mentally retarded level, but to my knowledge only one record with that result was found. All the others were around 56.

Q Well, doctor, let's talk about these ranges now. Is this something that is relative or is it absolute? I mean, for example, you can't be a little bit pregnant. You either are or you aren't. Now, how about being retarded. How does that work?

[2146] A You can be retarded in different ways. For example, a person who has a higher verbal scale for example, can repeat information by rote. If you tell a person that this is the way a judge looks with a black robe and you enforce that repeatedly and in this particular case, a person who has been taught that, goes to a courtroom where the particular judge is not wearing a black robe would not be able to understand why this person doesn't fit the image he has of a judge. He can repeat the words, but the understanding that goes with the words is not there, so that's a form of retardation. But on the surface, the language doesn't seem to sound as retarded. Then you give a set of principles that are simple. For example, if you go from here to there, you're probably going to be hurt. The person does not really put it all together completely, so that they may end up getting led very easily into destructive behavior or even harm through abuse or homosexual activity. They just do not have enough self preservation to protect themselves.

Q I'm not sure I made myself clear with my last question. Let me restate it. Are there any [2147] established ranges or grades of retardation or of intelligence generally?

A Oh yes, I misunderstood your question.

Q Now, would you give us briefly the full range so we'll have a yardstick to know where he sits?

A Normal intelligence is from 90 to 110, full scale I.Q. Borderline intelligence or between retardation and normal is between 90 and 75. Mild mental retardation is from 75 to 60. From 60 to 40 is considered moderate mental retardation. And from 40 to 0 is considered severe. Is that what—

Q Yes, sir. That's what I had in mind. Now, in fact, have you found any place in the Galveston records where he was stated to be severely retarded?

A I believe so. In fact, I think I read that earlier. They didn't use the word severe. They used "significant degree of brain damage." They did not use the word severe.

Q Let me see it, doctor. I might be able to find it. I'll hand you now the closing summary date November 11, 1965. Would you take a look at that for a moment, doctor?

A I imagine that the sentence that you were asking [2148] to look for was the following: "The psychological testing was done on August 25 and did reveal fairly severe retardation with a total I.Q. of just over 50. It also revealed marked evidence of classic organic brain damage."

Q Unless you see something that's particular pertinent, I'd like to move on to the Mexia State School.

A All right.

BY THE COURT: What exhibit is that?

Q Doctor, what's the exhibit number in red letters?

A Defense's Number Three.

Q And for the record, you're examining that now at this time, is that correct?

A Yes.

Q Does there show to be any psychological testing in that material, doctor?

A There is.

Q All right. Would you give us a synopsis of the results of those psychological tests?

A Well, they have a reference to the testing that we just talked about earlier, which repeated the same figures I cited earlier. This time he had a verbal I.Q. of 55, a [2149] performance I.Q. of 55, and a full scale I.Q. of 51.

Q All right, sir. Is this consistent with your overall opinion?

A It is.

Q All right. Just more evidence of the same thing, is that correct?

A Correct.

BY MR. PRICE: May I look to see where he was reading from?

BY MR. WRIGHT: Sure.

(Mr. Wright Continuing) In what range of retardation did they state that Mr. Penry was in at that time?

A Well, they didn't really call it any particular kind, but that's a moderate range of the intelligence—moderate range of mental retardation.

Q Let's move on to the Austin State Hospital. Oh. Another pile of papers.

A What do you want?

Q Psychological testing.

BY MR. NEWMAN: What's that exhibit number?

Q It's number seven, is it not, doctor? That's [2150] the one you're examining now?

A Yes. Test results: Johnny obtained a full scale I.Q. of about 50 on the short-form of the WAIS, with his verbal and performance subtests being nearly equal. This places him in the WAIS classification of Mental Defective intelligence.

Q Do the records reflect—well, you're familiar with the Austin State Hospital, aren't you?

A I am.

Q How do people get into the Austin State Hospital?

A Well, the mental health code provides several methods—emergency admission, which is a warrant of the justice of the peace in Travis County; an order of protective custody, from a District Court or from a county court; and an order of commitment, which is a temporary hospitalization not to exceed ninety days or an order of indefinite commitment, which is for periods longer than ninety days. In addition, there is voluntary admission.

Q All right. Now, in the cases of court ordered admission, he has to be found by a court to be mentally ill and insane before he goes in there, isn't that true?

[2151] A Not true. There are two special issues. (1) Is the person mentally ill. (2) Is this person in need of hospitalization or treatment in a mental hospital. Not the issue of insanity. Is the issue of mental illness enough to require hospitalization.

Q Excuse me for my loose use of the language here, but it is at least one of the pre-conditions that a judge has to find that he's mentally ill if it's one of these court ordered commitments?

A Correct.

Q From those records then, do you find what type of commitment that is?

A Yes. I had already noted earlier that this was a temporary commitment from order by Judge Pat Gregory on the 27th day of September, 1973.

Q Okay. Does it show how long he stayed in the Austin State School—Hospital?

A Admitted the 11th of September, 1973. Discharged the 3rd of October, 1973. Approximately thirty days, a little less.

Q In fact, wasn't he transferred on to Rusk?

A Yes. He was discharged on October 3rd and was— [2152] the temporary expired the 13th of December and he was transferred to Rusk State Hospital on the 3rd of October. October the 3rd. Certificate of Discharge # 105, October 3. I certify that Johnny P. Penry, who was admitted to this hospital as a patient on the 11th day of September, 1973, from Harris County, is discharged with transfer to Rusk State Hospital per order of Judge Gregory, County Court, Harris County, Texas.

Q All right. Anything of any great significance there, doctor. Anything else?

A No.

Q Next I'll present you with Defendant's Exhibit Number Six from the Rusk State Hospital, and if you would turn to the psychological testing there.

A Verbal 59, Performance 74, Full Scale 63. I believe this is the highest score I have seen in the records.

Q How would you characterize that in the gradations in retardation?

A In the lower limits of the mild range of mental retardation. Sixty is the division between mild and moderate. Below sixty is [2153] moderate.

Q All right. Now, we're using words like mild and moderate and borderline or something like this, but now, we're not talking about someone that's almost normal or are we?

A No. We're talking about someone, who, for example, could not function independently ever. And I mean literally and absolutely ever. There is just no way a person that has this type of intellectual functioning is going to be self-supporting, self-sufficient, self-caring at any time. That I can see with the knowledge I have at present.

Q Is that because he doesn't want to?

A No, that is not the reason. He can't.

Q Is it possible for him to want to and still can't?

A Yes.

Q I'm handing you now Defendant's Exhibit Number Nine, which is Texas Rehabilitation Commission. I believe I've this time been able to find the psychological testing.

BY THE COURT: That hasn't been admitted, I don't think. Do you show it as being admitted, [2154] Mrs. Johnson? (Court Reporter)

BY MRS. JOHNSON: Number Nine? No, sir.

BY THE COURT: You never have offered that.

BY MR. WRIGHT: All right. Let me confer with co-counsel just a a moment.

BY MR. NEWMAN: Could we have the Court retire the jury just a minute to go into this matter.

BY THE COURT: All right. Let's recess for about five minutes. Go in the jury room. We'll recess for about five minutes. Again you're admonished not to discuss the case among yourselves or with anyone else.

(Court recessed for five minutes) (Out of Jury's Presence) *

*(Mr. Wright informed the Court he had concluded his Direct examination)

BY MR. PRICE: Where is that Texas Rehabilitation Commission record?

BY THE COURT: It's Number Nine. Mr. Wright is that it?

BY MR. WRIGHT: That's it [2155] right over there.

BY MR. PRICE: Has this been offered?

BY THE COURT: No, it hasn't been offered.

BY MR. PRICE: These records haven't been offered?

BY THE COURT: No, sir.

BY MR. PRICE: Judge, at this time the State would offer into evidence this exhibit which has previously been marked Defendant's Exhibit Number Nine. We'll offer it under whatever State's Exhibit Number it would be, which are this man's records from the Texas Rehabilitation Commission.

BY THE COURT: I believe it's already been marked as Defendant's Exhibit Number Nine.

BY MR. NEWMAN: If the Court please. Mr. Price.*
—We object to that portion of these records dealing with his incarceration parole from the Texas Department [2156] of Corrections. We have no objection to any of the other material in the report other than this reference to this Defendant's prior offense.

*(Attorneys Approach the Bench)

BY THE COURT: All right. Let me ask both of y'all this. Is there any objection to admitting it for purposes of the record only and not exhibited to the jury and not referred to that portion.

BY MR. NEWMAN: Well, we have no objection.

BY MR. PRICE: Well, if that's the best we can do, Judge.

BY THE COURT: Defendant's Number Nine is admitted for purposes of the record and not to be displayed to the jury with limitations as counsel heard.

(WITHIN JURY'S HEARING)

BY THE COURT: Defendant's Exhibit Nine is admitted for the purpose of the record only. [2157] It's not to be displayed to the jury with the limitation as counsel heard.

(Defendant's Exhibit Number Nine Admitted for Purposes of the Record Only, Not for Display to Jury)

BY THE COURT: They haven't offered 1, 2, or 5.

BY MR. NEWMAN: Judge, that would be State's Exhibit something wouldn't it?

BY MR. PRICE: It's got D #2 at the top of it. He had it marked awhile ago.

BY THE COURT: They had it marked, but I'll note that the State is offering it, but it was marked as a Defendant's Exhibit.

BY MR. NEWMAN: Sometimes the exhibits are marked as the State's and the Defendant's.

BY THE COURT: All right. Have them marked again and we'll start off with State's Exhibit Number 58—number 9 will be, right?

BY MR. PRICE: Right.

[2158] (State's Exhibits Numbers Fifty-Eight Marked for Identification)

BY MR. PRICE: And State's Number Fifty-Eight, Judge, would that be the one that you admitted for the purposes of the record only?

BY THE COURT: That would be Defendant's Exhibit Number Nine. Is that what you just marked?

BY MR. PRICE: Yes, sir.

BY MR. NEWMAN: Judge, that's with the limitations, of course.

BY THE COURT: Yes, sir.

(State's Exhibit Number Fifty-Nine Marked for Identification)

BY MR. PRICE: Judge, at this time, the State would offer into evidence State's Exhibit Number Fifty-Nine, which has previously been marked Defendant's Exhibit Number Two.

(State's Exhibit Number Fifty-Nine Offered in Evidence)

BY MR. WRIGHT: Judge, we make [2159] the same objection that we made just before the bench, just the previous offer.

BY THE COURT: State's Exhibit Number Fifty-Nine is admitted for the purpose of the record only. It will not be displayed to the jury. The same limitation that no mention of the objectionable part be mentioned.

(State's Exhibit Number Fifty-Nine Admitted for Purposes of the Record Only, Not for Display to Jury)

BY MR. PRICE: Judge, I'm not sure, but I think in this exhibit the objectionable material has been deleted previously.

BY THE COURT: Is that right? Check it and see.

BY MR. WRIGHT: That's correct, Judge.

BY MR. PRICE: We would re-offer State's Exhibit Number Fifty-Nine.

[2160] (State's Exhibit Number Fifty-Nine Re-Offered in Evidence)

BY THE COURT: All right. State's Exhibit Number Fifty-Nine is admitted.

(State's Exhibit Number Fifty-Nine Admitted in Evidence)

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Dr. Garcia, have you ever seen State's Exhibit Number Fifty-Nine, which I'm now showing you?

A I believe so.

Q Have you seen any of the other Defendant's records from the Deep East Texas Mental Health and Mental Retardation facilities?

A I did. I don't have copies of this record, but I did have occasion to see them several weeks ago.

Q You don't have copies of those records?

A I don't think so.

Q You are familiar with this report by Dr. Peebles, are you not?

A I am.

Q Dr. Peeble's report, this, of course, was dated 1977, I believe, and of course, His report, his [2161] findings and diagnosis here are not consistent with your findings, are they?

A I would disagree with you.

Q Oh, you think they are consistent.

A Yes. If I can reach—Diagnosis: Mental retardation, moderate. Which is what I had addressed myself to. (2) Adjustment reaction of adult life—which is a general valuation of his behavior at the time. I think that in that respect, we are in disagreement, but the mental retardation and the degree of severity is the same that I've found consistent throughout the records. He does not make any reference to the cause of the mental retardation.

Q Well, maybe we should clear that up for the jury. I understand you've used the term mental retardation and organic brain damage. Are you using those terms synonymously or are they totally two different things?

A They are different things. The organic brain disorder causes as a symptom mental retardation. That is the cause of the mental retardation. What is observed on the outside in day to day function is the mental retardation, but the cause is the damage that has been incurred [2162] in the brain.

Q Is there anywhere in Dr. Peeble's report where he says in his opinion this man has any type of organic brain damage?

A No, he doesn't say it. He gives the history of all the injuries, but he doesn't call it organic brain damage. But he does say that he has mental retardation, possible to have mental retardation without some type of brain damage.

Q And is it not a fact, that at least Dr. Peebles in 1977 found the man legally sane?

A At the time that he wrote this report, that was his opinion, yes.

Q In 1977?

A Correct.

Q You disagree with that, I assume?

A Well, Doctor, you go all the way back to 1965 and you say this man has got this severe brain damage and

everything. At what point in time did he acquire this brain damage?

A Probably at birth.

* * *

[2235]

SHIRLEY FINLAYSON

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your name for the record, please.

A Shirley Finlayson.

Q Where is your residence?

A Tucson, Arizona.

Q Are you related to Johnny Paul Penry?

A I'm his mother.

Q All right. And he was born when?

A May the 5th.

Q Of what year?

A I'd have to think back.

Q All right. Where was he born?

A He was born in Lawton, Oklahoma.

Q All right.

BY THE COURT: Now, Mrs. Finlayson, you're going to have to speak up a little louder, some of [2236] the jurors can't hear you.

(Mr. Wright continuing) You do recall the experience of giving birth to Johnny, do you not?

A Yes, sir.

Q Were there any particular problems in child birth?

A Yes, sir. There was.

Q What were they?

A When Johnny was born, he was turned wrong, and they had to use instruments in order to complete his birth, and I hemorrhaged.

(OBJECTION)

BY MR. PRICE: Your Honor, I'm going to object to any hearsay statement as to what any doctor may have told her, if this is what she's fixing to testify to.

BY THE COURT: You can just testify to what you know of your own personal knowledge, Mrs. Finlayson. You can proceed.

(Mr. Wright Continuing) Well, Mrs. Finlayson, without telling us what any doctor actually told you, did you reach a conclusion in your own mind as to what the problem was at the time of birth?

A Well, I had complications, with his birth, and I started hemorrhaging pretty bad at his birth. [2237] And I needed blood very bad. In fact, they said I wouldn't live without the blood, and my husband was a Jehovah's Witness, and he didn't believe in giving me blood. So, I didn't have it, and I nearly died at this time. After—he took me home against the doctor's wishes and I had a nervous breakdown, and he put me in a state hospital in Fort Supply, Oklahoma, and I stayed there for about ten months.

Q Now, this state hospital, was that or not a mental hospital?

A Yes, sir. It was.

Q All right. Then you took your child back when he was ten months old or thereabouts?

A He was a little over ten months old, around ten months.

Q Then, you took up residence where, when you got your child back?

A We lived with his sister.

Q With whose sister?

A With my husband's sister. She was a Jehovah's Witness and we lived with her, in the house with her.

Q In what city and state, please?

A Houston, Texas.

[2238] Q Now, with whom was the child for these first ten months?

A With her. With his sister.

Q And her name is?

A Lucille Anderson.

Q All right. Then, you lived with her for some time, is that correct?

A Yes, sir.

Q And then, did you at some time thereafter move out of her household?

A Yes sir. Two streets from her.

Q Also in Houston?

A Yes, sir.

Q Then, how long did you live there?

A Approximately? I know it's been some time. I guess we lived there about four or five months.

Q All right. Did you have occasion to move out of the city of Houston?

A Yes, sir. Later on, we moved out of Houston, and we moved to Baycliff.

Q Approximately how much time is there between the time that you—

A Johnny was about—I guess about two years when we moved to Baycliff.

Q All right. Isn't it a fact that you lived in [2239] Baycliff until the time that he was old enough to start school?

A Yes, sir.

Q And when he became old enough to start school, did you enroll him?

A Yes, sir. I did.

Q All right. Did he seem to progress well in school or do poorly or how would you characterize him at school?

A I couldn't keep him in a public school. He didn't have the learning capacity that the other children had,

and the teachers said that they just couldn't cope with him. They couldn't teach him like the other children.

Q Did anyone suggest to you that you should take him down to the University of Texas Medical Branch and have him examined?

A Yes, sir.

Q And did you ultimately do that?

A Yes, sir. I did.

Q At approximately—well, before I get ahead of myself. Was he enrolled in any special schools in or around Baycliff?

A Yes, sir. He was enrolled in a school that was just about six or seven pupils in his class and [2240] they were all mentally retarded children, and I enrolled him there in Dickinson.

Q All right. And how did he do there?

A He didn't do very good there either.

Q Then, you took him to John Sealy Hospital, but now this, was, he was not actually committed and kept in the hospital, was he?

A No, sir. He wasn't.

Q Would that have been 1965 or 1966?

A Yes, sir.

Q Now, tell us about how this worked at John Sealy? How was he treated? Did you drive him down there one time or many times or how often?

A I took him down there a number of times, and the doctors would put him in a room and play with him with toys and stuff. Then they ran brain wave tests of him. I'm pretty sure it was at least twice that they ran brain wave tests on him. And the doctors, after they were all through, this took a few weeks, and after they were all through, they told me that I should put him in Mexia State school. And, of course, I guess I didn't want to admit the facts of it, and I told them I'd keep him with me, and he said, well, you can keep him with you, but he [2241] said what are you going to do when he reaches the age of 21 and you can't handle him at all?

Q All right. Now, I'm trying to get to a minor point, maybe, but did you take him down there every day or once a week, and over how much time, if you recall?

A Well, I believe it—it wasn't every day. It's been so long, I believe it was like once a week or once every two weeks, somewhere in that vicinity, because we lived quite a ways from Galveston, but it wasn't every day.

Q Now, then for a time then, after he was diagnosed in Galveston, did he live in your home with you?

A No, sir. Well, he did just for a short period until I went up to Mexia State School two or three times and looked the school over and everything and then we bought all the clothes and stuff that he would need, and I made up my mind to put him there, because I was scared for the other children and for him.

Q All right. During the meantime—well, let me ask yet this. Did he continue in the special education classes or not? For how long was he in the special education classes?

[2242] A In Dickinson.

Q Yes.

A I think Johnny must have been there about three years or something like that.

Q All right. That would be—he started school when he was about six, is that right?

A Seven. I think he was seven years old when he started school.

Q Then he stayed in special ed about three years?

A Yes, sir.

Q Was there any period of time when he lived in your home, but did not attend school?

A Yes, sir. At intervals there, he didn't attend school.

Q For intervals of as long as a few months or how long?

A I wouldn't say it was months. No, sir.

Q Why did he not attend school during those intervals?

A Well, like when the teachers and all said he couldn't attend the public school, it was several months there before I got him into the special school at Dickinson.

Q Okay. But now, how long did he stay at the [2243] special school in Dickinson?

A I really don't remember the amount of years. I think it was like three years, but I couldn't say for sure.

Q What academic grade in school did he complete?

A He was just in that one class all the time. And he never completed any grade of school. All the children were from ranges say seven years old until on up to fourteen. The little girl that lived next door to me was fourteen and she was going. And they were all in the same class together.

Q Now, were you employed outside the home during this—

A Yes, sir. I was.

Q Okay. From the time he started to school, were you employed outside the home?

A Yes, I was.

Q And in these intervals when he didn't attend school, who would take care of Johnny?

A Well, my daughter or if my daughter was at school, then Mrs. Turner, the next door neighbor would.

Q Now, tell me this. Did you have to take any special measures to control Johnny at home?

[2244] A Yes, sir. He was harder to control than the other children. Johnny was a good minding child. In fact, he was the best minding I had, if I was looking at him. You know, but the minute that I would go to work or something, well, I didn't know. I had my daughter call me all the time or Mrs. Turner or I called them to check to see that everything was all right.

Q Did you have to confine him to his room? over any length of time?

A Well, he was confined to his room—he wasn't supposed to be confined to his room in the daytime, but at night, his dad put plywood up at the window and he put a lock on his bedroom door because Johnny would go out at night, and he would prowls around the neighborhood and we were afraid for his safety. Afraid that someone would think that he was a prowler or something.

Q Well did you have to lock him into the room?

A Yes, sir. He was locked into his room at night.

Q Locked from the outside?

A Yes, sir.

Q Can you give any examples of any unusual or [2245] bizarre conduct that caused you to believe that his mind might not be sound?

A Well, he didn't learn like the other children did. He was awfully slow in learning. In fact, I never did like potty train him at all. I mean, I couldn't.

Q By that, do you mean that he wet the bed at night?

A Yes, sir.

Q At what age was he still doing that?

A Well, he was still doing that when I put him in Mexia State School.

Q Approximately what age was he at that time?

A Twelve years old. When I put him in Mexia, he was twelve. My youngest son, Jesse,—I know that Johnny didn't mean to hurt him, but one day he was sitting in the high chair in the kitchen and I'd just fed Jesse, and he was still in the high chair, and Johnny had—I heard Jesse scream, and I went in there and Johnny was picking all the skin from his feet with a straight pin. Just unusual things. He would tell me that he didn't mean to. My sister came down and she was staying with us and her sons were there, and we gave them—
[2246] Q If you get to the point where you don't want to proceed, we'll just take a recess for a little while.

A Well, it's hard to tell about these things.

BY THE COURT: Can you proceed, Mrs. Finlayson?

BY MRS. FINLAYSON: Yes, sir.

BY THE COURT: All right.

(Mrs. Finlayson Continuing) We sent all the children out to play with some cookies, and they started crying and ran to the door, and Johnny had taken some dog stuff outside and had smeared it all over their cookies and things.

Q Dog manure, is that what you're speaking of?

A Yes, sir.

Q Were there many other instances of similar bizarre conduct?

A Well, there were lots and lots of things. I guess I just prefer to forget them.

Q I understand, Mrs. Finlayson. This is your son and this is a very difficult thing for you to have to tell folks about. If any of those things can possibly come to your mind, they need to come to this jury's attention at this time.

A Well, he would pick scabs off the other kids [2247] and off of him self and eat them.

Q What would he do with the scabs, if anything?

A He'd eat them.

Q How were his eating habits in general?

A He ate good.

Q Did he have any peculiar habits with regard to food?

A No, sir.

Q He didn't hide food?

A Oh, he would hide food. Yes, sir.

Q How would he do that? Could you describe how that was done?

A Well, in his room he had his closet and up in the closet was a ladder that went up to the attic, and he would take loaves of bread and cakes and stuff out of the freezer and he would hide them up in the attic. He would dirty in his clothes or dirty in the room at night, and he had broke a hole in the sheetrock in his

room and he would stuff all his dirty clothes and stuff down in there. I finally found them down in there. I kept smelling something, and when I cleaned up his room, I finally found them down in the hole, where he'd hide them.

[2248] Q Mrs. Finlayson, you became divorced from Mr. Penry some years ago, isn't that true?

A Yes, sir.

Q And you've since remarried, isn't that true?

A Yes, sir.

Q Now, during this divorce that you went through with Mr. Penry, wasn't there a child custody dispute that was resolved by the courts?

A Yes, sir.

Q And during that trial, wasn't there a contention on the part of your husband that you had been abusing the children, isn't that true, that there was a contention made like that?

A There was a contention on that part, but I almost had custody of my kids. And went to the last court, because we had restraining holds against I had my youngest son, and I had to put a restraining hold against him so he wouldn't take Jesse from me, because he did try to take him.

Q Mrs. Finlayson, I just want to ask you some questions and get answers to what I ask. Okay.

A Well, there was also an abuse part on his part. I want to get that out. On his sister and himself.

[2249] Q All right. So, the fact is that there was a contention on his part that you were beating the children including Johnny and there was a contention on your part that he and his family were abusing the children, including Johnny, isn't that true?

A And my lawyer got killed. And they laughed because he got killed.

BY THE COURT: Mrs. Finlayson, just answer the questions.

BY MRS. FINLAYSON: Yes, sir.

(Mr. Wright Continuing) Your lawyer getting killed didn't have anything to do with that lawsuit, did it?

A No.

Q All right. Mrs. Finlayson, are there any other examples of unusual conduct that you can tell this jury about?

A No.

Q Are you sure that there are more if you could think of them all?

A Yes, sir. I know there's some more.

Q We'll pass the witness.

BY THE COURT: All right. Mr. Price, do you have questions for this witness?

[2250] BY MR. PRICE: Yes, sir.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Finlayson, just one minor point, I guess. You said a while ago that he was not toilet trained or potty trained?

A No, sir. He wasn't.

Q Until what age?

A He wasn't even in Mexia, because when we went up to see him and all they would tell me, you know, that he would wet the bed and all. He would wet in his clothes.

Q Is that primarily bedwetting at night as opposed to just not being toilet trained in general?

A No, sir. He couldn't control himself in the daytime or at night.

Q Now, I'm looking at a record here dated May 2, 1966, which has been introduced into evidence by defense counsel, and it's a letter from the psychiatrist at the University of Texas Medical Branch at Galveston, and I'm quoting "Toilet training was started at 10 months, but Johnny is presently enuretic and wetting

the bed nightly. He is not said to soil himself [2251] unless he has loose stools."

A No, sir. He did soil himself.

Q So, that is incorrect?

A Yes, sir.

Q Over what period of time did you take Johnny Penry to the hospital or to the doctors in John Sealy in Galveston?

A I don't really remember how long it was. I do know that I went there several times.

Q The records indicate in one place July-August, 1965 and then there is also some possible indirect mention of maybe into the fall, such as maybe September and October, would that be about right for your recollection?

A Yes, sir.

Q Some three or four months?

A Yes, sir.

Q And I believe you said that you carried him once a week or once every two weeks, something like that?

A Yes, sir.

Q You missed some appointments, too, didn't you?

A I don't know if I did or not. I don't remember.

Q Even at once a week over three or four months would be—what—12 to 16 times that he may have [2252] gone to see the doctors, at most?

A I couldn't say for sure. That's been a long time ago.

Q You weren't around when he went to Austin State Hospital and then was later transferred to Rusk, were you?

A I know nothing about this, no.

Q Okay. Well, then the only thing you have any knowledge about is these times that he went to John Sealy as an out patient and then went to the Mexia State School?

A Yes, sir.

Q One thing that you said a while ago about his learning capacity, you said that that was the reason he didn't—he didn't have the learning capacity or appropriate learning capacity and that was the reason he had trouble in school. Isn't it also a fact, Mrs. Finlayson, that he had a lot of aggressive tendencies that also caused problems and not just his learning capacity.

A By aggressive you mean to the other children?

Q Right.

A Yes, sir.

Q In his records, it refers to hitting and biting [2253] of your three year old boy, would that be reasonably accurate?

A Yes, sir.

Q One of the other types of behavior he exhibited was setting fire to a friend's bathroom, while he was in her care?

A Yes, sir.

Q Jabbing girls in the classroom with a newly sharpened pencil?

A Yes, sir.

Q Then there is a statement here that you described John as being impulsive, hyperactive, and being unable to remember or follow through on instructions, is that—?

A Yes, sir.

Q What I was referring to a while ago on performance is I'm looking at the diagnostic evaluation from John Sealy dated July 29, 1965, in disposition it reads, "An appointment was made for August 4th for the purpose of giving John psychological tests and to complete the evaluation. This appointment was not kept. Effort is being made with assistance from Mrs. Juanita Brook of the Galveston County Health Department to encourage the family to continue [2254] the evaluation." Does that bring back any recollection?

A I possibly missed. I was under a doctor's care too. I had just become a diabetic at that time, and I was pretty strong under a doctor's care at that time too—

Q There is another record here. It doesn't have any kind of title, but it says "School has him down as retarded, but tests show he was just slow."

A No, sir.

Q You don't recall anything about that?

A It was—

Q Well, it wasn't anything that you gave. This is merely a page out of his records, just like all of these other records.

A Well, he was slow, true enough, but he never could learn to spell his name or anything.

Q After you had this nervous breakdown back shortly after his birth, and I believe you said that you were in the hospital for several months, at least, in that period of time and then you were released. Did you ever have any problem after that?

A When I had Jesse, my youngest son, I went [2255] through almost the same thing. I needed blood at that time, and didn't get it. And had a nervous breakdown.

Q So it wasn't just peculiar to just this particular child. In other words, you had a similar type problem with another child?

A Yes, sir. I had.

Q Doctors diagnosed that here in these records here as post partum psychosis. Have you ever heard of that?

A No, sir.

Q There is another reference here. It says "The pregnancy was normal. Labor was long and hemorrhaged three days post-partum. Mrs. Penry's condition deteriorated into a post-partum psychosis of ten months duration." Does that ring any bells with you?

A I know—this is when Jesse was born or Johnny?

Q No, sir. This was on Johnny Penry.

A All I know is that I hemorrhaged real bad.

Q I would take it from these records. I'm certainly not going to hold myself out to be any kind of medical expert, but Hemorrhaged three days post-partum, I take

it to mean you hemorrhaged for at least three days following [2256] the birth of the child.

A Yes, sir.

Q Then this deteriorated into a post-partum psychosis or your mental problem. Would that be accurate?

A Yes, sir.

Q And then you did have the problem also with your youngest son?

A With Jesse, my youngest.

Q Has Jesse ever been in a mental institution or anything of that nature?

A Jesse?

Q Yes.

A No, sir.

Q You don't have any similar problems with him that you've had with Johnny?

A No, sir.

Q When was the last time that you had an occasion to be around Johnny Penry on a regular basis prior to October 25, 1979?

A Before Johnny got into any trouble at all, I flew down and went to see him and took Johnny out to eat. He was at his dad's house, and I took him out to eat. And the next time I seen him was one time in the jail at Livingston.

[2257] Q But as far as any regular basis, say two or three days in a row or anything of that nature, when was the last time you may have had an opportunity to be around him?

(OBJECTION)

BY MR. WRIGHT: May I object here. May we approach the bench Your Honor?

BY THE COURT: Yes, sir.

(Attorneys approach the bench)

(OFF RECORD)

BY THE COURT: Mr. Price and Mr. Wright, approach the bench again, please.

(Attorneys approach the bench)

(OFF RECORD)

[2258] (Mr. Price Continuing) When were you and your husband divorced?

A I think it was about six or seven years ago.

Q Somewhere around 1973, give or take a year or so one way or the other?

A Yes, sir. Somewhere around there.

Q After the divorce, did you have an occasion to have possession or custody of Johnny for any lengthy period of time?

A No, sir. Not at all.

Q Would it be fair to say that you have not been around him on a regular basis to observe him on a regular basis since about the time of your divorce or even before your divorce?

A When he was put in Mexia—the last time I had occasion to be around Johnny was when we would bring him home on weekends before I left my husband.

Q So that would be some time prior to the divorce?

A Yes, sir.

Q Do you recall about what year that might have been?

A Well, I think it was about three months before we could even see Johnny after we put him in [2259] Mexia and after that it was at intervals on weekends or something we'd bring him home and then take him back.

Q What years or what period of time was he in Mexia?

A Well, he was twelve years old when I put him in Mexia, and when I left my husband, he went and took him out of Mexia.

Q Well, what I'm really getting at is how many years ago has it been since the last time that you had an occasion to be around Johnny Penry?

A When I took him out to eat. In Livingston.

Q How many years ago was that?

A Well, this was just before he got into trouble. I went to his dad's house and asked him if I could take him out to eat. This was what—I guess three, three and a half year ago. I guess.

Q Okay. But I'm talking about Mrs. Finlayson where you might be around him for two or three days and have him with you where he might spend or you spend the night with him.

A No, sir.

Q How many years has it been since that?

A Well, I don't remember exactly how old Johnny was when we were separated, but the last time [2260] was when I brought him home on weekends, before I left, from Mexia.

Q And that was when he was some twelve or so years of ago?

A Maybe thirteen, something like that.

Q How old is he now?

A He's twenty-three.

Q So that would be about ten years ago?

A Yes, sir.

Q Roughly? Would that be fair?

A Yes, sir.

Q And since that time, how often have you seen him?

A When I would go see the children, well, of course, I would see Johnny too. But a lot of times, Johnny wasn't there.

Q Would it be fair to say that you've had very limited contact with him over the last ten years?

A Yes, sir. I have.

Q Mrs. Finlayson, you are aware that some of these records—at least after you and your husband had sep-

arated, some of his records indicate some rather serious abuse by you toward him, are you not?

[2261] A Yes, sir.

Q Who pointed that out to you the first time?

A Janice Fuller.

Q And when was that?

A During our divorce, trying to get custody of my kids.

Q When was the first time you were aware that these medical records had all of this child abuse information in it?

A Right here.

Q Right here. Who pointed that out to you?

A You did.

Q And that was what, a couple of weeks ago?

A Yes, sir.

Q And up until that point in time, you were not aware that his medical records had all of this information about child abuse in it, were you?

A No, sir. Not at all.

Q And are you telling the jury that any of that information in there about how you abused this child is true or false?

A It's false.

Q And aren't those records from the time when you were in the process of getting a divorce from Johnny's father?

[2262] A Yes, sir.

Q And at that time you were also in a custody battle with him over the children?

A Yes, sir. I was.

Q Pass the witness.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Now, Mrs. Finlayson, is there any doubt in your mind that child abuse with regard to Johnny did occur?

A I know it occurred.

Q All right. But the dispute between you and your husband was it as a result of your actions or his actions, is that the crux of the dispute?

A I know that it occurred, when they got him out of Mexia, because my other children would tell me how Jan and John abused him.

Q Okay. The examples of aggression that are in the Galveston records, getting into what I guess you'd call scuffles with the school children and so forth, that would have been examples of behavior that occurred when he was six to eight or nine years old, isn't that true?

A Yes, sir.

[2263] Q Now, his visits to the Child and Adolescent Psychiatric Division down at Galveston, when you would take him down there, once or twice a week as you said, would he stay all day, half a day, a few hours. How long did he usually stay?

A He would stay for a few hours.

Q Pass the witness.

BY MR. PRICE: No further questions.

BY THE COURT: Mrs. Finlayson, you may step down. Who is your next witness, counsel?

BY MR. WRIGHT: Trudy Penry. Oh, excuse me, David Finch.

BY THE COURT: Mr. Finch, you were sworn in Monday, weren't you?

BY MR. FINCH: Yes, sir.

* * * *

[2274]

TRUDY PENRY

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your name, please, for the record?

A Trudy Penry.

Q Where do you live?

A Livingston, Texas.

Q Are you related to Johnny Paul Penry?

A Yes, sir.

Q What is your relationship to him?

A I'm his sister.

Q What is your age?

A Twenty-five.

Q And so, he's a couple of years younger than you, is that correct?

A Yes, sir.

Q And you and he grew up together for, at least, a number of years, isn't that correct?

A Yes, sir.

Q I'll take you back to when you were living in Baycliff, that time period.

A Yes, sir.

[2275] Q Do you recall the approximate range of time when he was enrolled in school in Baycliff?

A Yes, sir.

Q Do you—

BY THE COURT: Excuse me. Miss Penry, speak up where the jury can hear you now. We don't have a PA system. Speak up.

(Mr. Wright Continuing) Do you have any knowledge of what grade in school he attained there in Baycliff?

A Yes, sir. He went to the first.

Q Okay. Did he ever complete the first grade?

A No, sir.

Q All right. In fact, he was taken out of the first grade, is that accurate?

A Yes.

Q Then after that what did he do? What type of school was he enrolled in?

A We put him in a special school in Dickinson.

Q Did he remain enrolled there—do you recall how long he remained enrolled there?

A I can't recall. It wasn't very long though, because we soon had to take him out of school completely.

Q Was he enrolled in Dickinson in the special [2276] school for as long as a year, do you think?

A I just can't remember.

BY THE COURT: Miss Penry, the jury can't hear you. Speak up where they can hear you.

Q All right. You can't recall how long he was enrolled in the special school in Dickinson, but do you remember any periods of time in which he just wasn't enrolled in any school at all?

A Yes. He was at home for a long period of time.

Q When you say a long period of time, are you talking about a period of weeks, months, years?

A Years.

Q How many years, if you can recall?

A Maybe five or six.

Q During that period of time, was your mother employed outside the home?

A Yes, sir.

Q Was your father employed outside the home?

A Yes, sir.

Q Who took care of Johnny when they were both gone?

A When I was at home, I took care of him.

Q All right. Were there any times when he was [2277] left at home unattended?

A Yes, sir.

Q Were there many times or few times?

A Maybe quite a few.

Q All right. Was it a regular practice to leave him at home unattended or not, if you know?

A Well, a lot of times my mother worked nights and she slept during the days at home.

Q But other times she was not at home, is that true?

A Yes, sir.

Q All right. Were there times when he was left unattended and locked inside his room?

A Yes, sir.

Q Did his room have an adjoining bathroom?

A No.

Q He couldn't get to the bathroom from there?

A No, sir.

Q Was he left locked in there for hours at a time, as long as an hour or longer than that?

A Longer.

Q Do you know of any examples of unusual or bizarre behavior that he may have engaged in as a child?

A Yes.

[2278] Q Would you relate some of these to the jury?

A Well, he would hide food in his room, and things of this nature. He'd even take bread and ice cream and hide it up in the attic and never touch it. Things like that.

Q What about any conduct with regard to his relationship with his younger brother, Jesse?

A Well, he would take a pin sometimes and pick the skin off his feet and my brother's feet. Not meaning to hurt him or anything, just something to do like that, when he was young.

Q What did he do with the skin he'd picked off?

A He would just pick his skin off and sometimes he would eat it and things like that.

Q This was at an age of 6 to 10 years of age, is that accurate?

A Yes, sir.

Q Did he ever learn to read or write, to your knowledge?

A No, sir. He can sign his name, and my aunt spent a year teaching him to do that.

Q All right. Did Johnny receive any beatings or whippings or injuries about the head that you know of?

A Yes, sir.

[2279] BY THE COURT: Just a minute. Miss Penry, speak up where the ladies and gentlemen can hear you on the jury.

(Mr. Wright Continuing) What, particularly with regard to any injuries about the head, with what type of instrument were these beating administered?

A I don't understand.

Q Did he get beat over the head with a club or hit with a belt or what was he—

A With a belt.

Q Did the belt have a metal buckle on it or not?

A Yes, sir.

Q Did it cause any scarring or anything like that, that you know of?

A Yes, sir. He always had a lot of scars on him.

Q Who administered the beatings?

A My mother.

Q Is that the lady that just was on the witness stand?

A Yes, sir.

Q Ahead of you today? Have you got any other examples of bizarre conduct that he would engage in?

A Well, he always would act afraid.

[2280] Q What was he afraid of?

A Afraid of the dark. He always acted like he was afraid of people.

Q His conduct with regard to other children, was it regular and normal or not?

A I wouldn't say it was normal. He would play with younger children. Younger than he was.

Q I see. Can you give examples of the kind of play and activity he would engage in at particular ages, if you can?

A Well, I know even when he grew older, he will still play games little boys play. Even in his older teenage years.

Q How much of an age gap was there in the playmates that he had in his late teens?

A They were just smaller children. He always enjoyed playing with smaller children, littler than he was.

Q About what age children would he play with in his late teens?

A Oh, six, seven, eight years old.

Q So an age gap there of roughly ten years, maybe not quite that much?

A Yes, sir.

Q Did he seems to enjoy the company of the younger [2281] children more than he did the company of his own age group?

A Yes.

Q Did he receive many whippings or few as a child?

A Many.

Q Tell me what can you say about the condition of his room and the condition of his person at the end of these intervals of time when he was locked up in his room during the day?

A Well, there were holes in the walls and he would use the bathroom in the walls. And there was hardly ever a mattress on his bed. It was just a bare type of room, just the bed and that's it.

Q What items of furniture were usually kept in his room?

A Just usually a bed, maybe a chest of drawers.

Q Was there any reason to keep things out of there?

A Yes, sir.

Q What was that reason?

A So he wouldn't hurt himself.

Q Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Miss Penry, aside from the matters that you've [2282] already described, did he ever over the years and particularly after he got up to be a teen ager, did he ever exhibit other aggressive tendencies toward other children, such as pull a knife on them or jumping on them with his fist or anything of that nature?

A No, sir.

Q Are you aware of the time when he was in the Austin State Hospital and the Rusk State Hospital?

A I can remember when he was in Rusk, but I can't remember when he was in Austin.

Q Okay. You'll take my word for it. It was really one continuous stay. He was only in Austin for about twenty-two days, so I can understand you forgetting that, but do you recall any conversation or talk around the family about them having problems with him pulling knives on other patients, starting fires, trying to set other patients on fire, fighting and picking on other patients, things of this nature?

A I don't recall him ever discussing pulling knives or anything like that on anybody.

Q Okay. Did you ever have that problem with him say in the last several years at home?

A No, sir. I don't recall him ever pulling a [2283] knife on anybody.

Q All right. Now, of course, he can dress himself and all of this, can't he?

A Yes, sir.

Q He can cook, at least, maybe eggs or things of that nature?

A Maybe something simple like eggs.

Q I believe you've stated previously that he can read a phone number?

A Perhaps, if you write it out for him and everything.

Q And, I believe he stayed with y'all only about nine days before he was arrested back last October, wasn't that correct?

A Yes, sir.

Q That was the only occasion that you've had over the last several years to be around him, wasn't it?

A Yes, sir.

Q But during that nine day period, you didn't have him locked up or anything like that, did you?

A No, sir.

Q He did go around town, isn't that correct?

A He was kept under close supervision.

Q He didn't ever go up town applying for a job [2284] things of this nature on his own?

A I think my dad allowed him to do that, but I was never home during the day.

Q Oh, I see. Back to the Mexia School, they didn't turn him away. It was your family's choice to take him out of the Mexia State School, wasn't it?

A Yes, sir.

Q And outside of this nine days just prior to October 25th, 1979, when was the last time you had an occasion to be around this Defendant for any period of time? Say, two or three days continuously.

A You mean in the period of the nine days?

Q No. Prior in time to that. I'm aware that he was there at home for about nine days in October.

A Well, I would go visit him at my aunt's house and I also visited him when he was in prison, as much as I could.

Q What I'm talking about though, didn't you testify previously that it was since 1975 since you've been around him on any type of regular basis?

A Yes, personally, but I did visit him when he was in prison.

Q But my question is, since 1975, since you've been [2285] around him, say as much as 24 hours at one time?

A Yes, sir.

Q Pass the witness.

BY MR. PRICE: Pass the witness.

BY THE COURT: All right. You can step down, Miss Penry.

BY MR. WRIGHT: May she be excused?

BY THE COURT: Do y'all have any objections? I don't have any objections.

BY MR. PRICE: Judge, I'm sorry. I know this is a problem. May I call her back for one additional question?

BY THE COURT: Miss Penry. Yes, sir. And then we'll excuse her.

BY MR. PRICE: May I see the file? I need to look up a subpoena.

* * *

[2305] PATSY GENIECE ROSS

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your name for the record, please?

A Patsy Geniece Ross.

Q And what is your residence, please?

A I live in Houston.

Q Do you bear any relationship to Johnny Paul Penry?

A I'm his aunt.

Q Have you ever lived in the same household that he did?

A Yes, sir. I have.

Q Approximately when was that and where?

[2306] A It was in Goodrich, when I first moved in with the family.

Q All right. At that time, I take it, you were not married, is that true?

A No, I had just been recently divorced.

Q Are you married now?

A Yes, I am.

Q Approximately when was it that you were living in the same household as Mr. Penry?

A With my brother, John.

Q Johnny Penry. We'll get to that in a minute.

A Okay. Well, Johnny wasn't there at the time that I moved in with my brother John. He had the other three children.

Q All right. So the household then—

A That would have been in 1971, I guess.

Q And so, then in the household was your brother, John Penry, is that correct?

A Yes, sir.

Q And his children, is that correct?

A Right.

Q And yourself, then? That was who lived there?

A Right.

Q Where was Johnny at that time?

A He was at Mexia State School.

[2307] Q Then did he have occasion to come and be a member of the household that you lived in?

A Yes.

Q Do you know approximately when that was?

A Well, it was a couple of months later, approximately, I think.

Q 1971?

A I believe it was.

Q Were you employed outside the home at that time?

A No. No, my brother wanted me to stay there and take care of the children, while he worked.

Q Then, did you try to care for Johnny Paul Penry during that period of time?

A When he came home, yes.

Q All right. Now, after he came home from Mexia, he was there for some time, isn't that true?

A From that time on.

Q Did you—was he attending school at that time there in Livingston or Goodrich?

A No, he couldn't attend school. He couldn't do that.

Q Why not?

A He just didn't have the capacity for it.

Q So, did you attempt to teach him anything or tutor him in any way?

A Yes, sir. I did.

[2308] Q Did you attempt to teach him to read or write?

A Yes, on small words. I started off with small things maybe that he could understand. Things that he might need to know.

Q Did you attempt to teach him to write his name?

A Yes, sir.

Q Over what period of time did you undertake to teach him to write his name?

A Well, it took me quite a spell. He could print it, but he couldn't write it. He could

Q print, but he couldn't spell it all, all together at the same—you know, he could put some of the letters down, but he couldn't spell it correctly. But he could print it, but he couldn't write it.

Q How old was he at that time?

A I think he was about fourteen. Thirteen or fourteen. Fourteen or fifteen. Fourteen or something like that. He was a teen-ager.

Q You say it took a good spell of time to get him to where he could write his name out, was that a matter of days, weeks, months, years or what?

A Nearly a year, if not a little bit more than.

Q Now, how often did you work with him trying to get him to learn that?

[2309] A Every day. A little time every day. Repetitiously.

Q A matter of what, an hour a day or that much of the day or?

A As much attention as I could keep. He had a short attention span. Sometimes he could concentrate a pretty long time, sometimes he couldn't. Sometimes some days, we didn't do nothing at all.

Q Okay. But there was some time spent almost every day, is that fair to say?

A Yes, sir. I attempted to keep him occupied.

Q Did he require any special kind of supervision?

A Yes, sir. He needed the supervision.

Q Well, was he able to do household chores?

A If you watched him and showed him several times. And if you took your attention off of him, then he might not do it. And if he did it, he might do it all wrong.

Q. Tell us about his eating habits or any particular habits with regard to food that were unusual, if there were any.

A Well, he liked to eat, definitely. A growing boy does eat a lot too.

Q Teen-age boy?

A Right.

[2310] Q Would he hoard food or hide food or anything along that line?

A Yes, he would for awhile, but we finally got that worked out through talking it over constantly. That he didn't have too, it would be in the icebox, if he wanted it.

Q Did it take a long time to get him to understand that?

A Well, yes, but I couldn't exactly say how long. Because it was just a slow period of going over it and over it and over it and over it.

Q What about toilet training and bedwetting, was there any problem in that area?

A Yes, there was a good deal of that.

Q Would you describe what that problem was?

A Well, he would do it. Lots of times I wouldn't know if it was something physical or something mental,

because I'd just come to live with them, you know. So, by trial and error, I just figured out that he was going to do it anyway. There was just no way that I could prevent that, so I—

Q Well, was he wetting the bed at night?

A Oh, yes. He wouldn't during the day. He would go to the bathroom during the day. But [2311] just when he would go to sleep, he would sleep so hard. A lot of that I think was because he slept hard.

Q All right. Anything unusual about his bowel movements or anything like that?

A No.

Q Did y'all try to keep a garden in the household that you were speaking of earlier?

A Well, not exactly, because the ground was like clay out there. You couldn't plant too many things, and we didn't have a tiller or nothing like that, but we did flowers. There are a lot of flowers that you can grow in clay.

Q Okay. Did you get Mr. Penry, Johnny, I'm speaking of, to try to help you with some of the garden work?

A Yes, I sure did.

Q Did you try to have him hoe in the garden or do anything in the garden?

A I wanted him to hoe the weeds, but lots of times he'd hoe the flowers and leave the weeds. He couldn't recognize it for a long time unless I just pointed it out absolutely and stood right over him and "that's what you don't chop down."

Q Did it take a considerable amount of time to [2312] get him to learn the difference between the flowers and the weeds?

A Sometimes—I don't know about right now, but sometimes he still couldn't discern it. If I turned my back on him, he was going to do what he wanted to do. If he was going to chop, he was going to chop what he wanted to chop. There was no way out of that. Lost a lot of flowers that way.

Q Prior to the time that you came to live in the Penry household there, had you had frequent or infrequent contact with Johnny?

A Oh, prior to that time, I had some contact with him, but it wasn't real, real close, except for a period of about a year.

Q About what age was he at that time?

A This was before he went to Mexia.

Q So, they were living where?

A I think the year was 1967.

Q At that time, do you know if he was enrolled in school?

A No, he wasn't enrolled in school.

Q Do you know whether or not his mother was employed outside the home?

A Yes, she was.

[2313] Q Was his father employed outside the home?

A Yes, sir.

Q Were there times when he'd be left at home unattended? Or do you know?

A I was there. I moved down there in 1967, but Shirley had gone to the hospital. She had an operation on her legs, and the doctor told her to stay off her legs, because she had these varicose veins. And I went over there and I stayed with her for awhile. And I was around the kids for about two weeks, constantly at that time.

Q At that time, had there been any modifications of his bedroom and so forth so that he could be locked in there or not?

A Well, he was latched in there at night, because he would wander around. That's the way I understood it. But when I was there, he wasn't latched in all the time, because I was there and he could get out.

Q You say that when you lived in the Penry household, from 1971 for sometime after that, that he required constant care and supervision, that's true, isn't it?

A Yes, sir.

[2314] Q As far as you know, from any of your contacts back earlier than that, has there ever been a time when he didn't require such constant supervision?

A He's always required it.

Q We'll pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Rose, were you formerly known as Patsy Fuller?

A Yes, sir.

Q And who would Lucille Anderson be?

A She's our oldest sister.

Q And, of course, Trudy Penry would be your niece?

A Right.

Q Do you recall when this Defendant was put in the Harris County Jail for arson?

A Yes, sir. I do.

Q And I believe you and Trudy and Lucille went down to Harris County and gave the Harris County Mental Health Service some rather detailed information about his background? Is that correct?

A Yes, sir. What we knew.

Q Was that an effort to help him out on his arson [2315] charges?

A No, sir. We wanted Johnny to have some help.

Q Was he in jail at that time for arson?

A He was there, yes, I think. He was in the psychiatric thing there, you know.

Q He was in the Harris County Jail, wasn't he?

A The time that we went down there—I'm not real sure about this, because I think that he was there at the hospital. That Jefferson Davis.

Q You think so?

A I believe so, because that's where I went.

Q You went there to give the information to the mental health people, but isn't it a fact that he was actually in the Harris County Jail?

A Well, I never saw him, but I thought he was there, you know.

Q Okay. I see. Then shortly after that he was sent to Austin State Hospital?

A Yes, sir.

Q And then transferred to Rusk State Hospital?

A Right.

Q And he was in both of them about four months, would that be about right, roughly?

A About that, I believe you're right. I'm not real good on those dates.

* * *

[2323] KENNETH VOGTSBERGER

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. KEESHAN:

Q Dr. Vogtsberger, would you state your full name for the jury, please?

A Kenneth N. Vogtsberger.

Q And where do you live?

A I live in Lufkin, Texas.

Q And how are you employed?

A I'm the clinical director. I'm a psychiatrist with the Deep East Texas Regional Mental Health/Mental Retardation Center.

Q And how long have you been a psychiatrist?

A I've been involved in psychiatric work about [2324] four years and eight months.

Q What was your training for that occupation?

A I had a psychiatric residency at an approved residency program at Timberlawn Hospital in Dallas, Texas.

Q And did that follow some other formal education?

A Yes, sir. I attended medical school at the University of Texas Medical School at San Antonio and achieved my M.D. degree there.

Q Who are you working for at this time?

A The Deep East Texas Regional Mental Health/Mental Retardation Center.

Q And at what physical location is that?

A The main office is in Lufkin, but we have outreach clinics in several smaller communities here in the East Texas area.

Q And is there one small clinic in Groveton?

A Yes, sir.

Q Do you sometimes work in that clinic?

A Yes, sir. I do every Thursday.

Q I'll ask you if you have had occasion from time to time to examine persons with regard to their competency or whether they might be insane or not?

A Yes, sir.

[2325] Q Are you aware of a person by the name of Johnny Paul Penry?

A Yes, sir.

Q What was your first knowledge of anything to do with Johnny Paul Penry?

A I was asked to do a psychiatric evaluation on him, requested by the Court, for competency.

Q When you say, requested by the Court, who are you speaking of?

A I believe it was Judge Dean, who had signed the order requesting this psychiatric evaluation.

Q All right, sir. And when did that take place?

A This was November 29, 1979.

Q November 29, 1979. Is that the date you were ordered or requested to perform the examination or is that the date you actually performed it?

A That was the day I did the examination. I don't remember exactly when the order was signed by the Judge.

Q Was your examination conducted shortly after you received the order?

A Yes, sir.

Q In preparation for such an examination, what—were you furnished any information surrounding this case or involved in this case?

[2326] A Yes, sir. I was furnished with the arresting officer's report and also two confessions, statements, I believe, signed by Mr. Penry and also a cover letter from Mr. Price's office, District Attorney, just saying the contents of that packet that was delivered to me, along with the order from Judge Dean, verifying the order for the psychiatric evaluation.

Q All right, sir. Would it be true that you were furnished with what is commonly called, offense reports from the arresting officers?

A Yes, sir.

Q Did you examine those documents?

A Yes, sir.

Q Did they appear to deal with the offense with which Mr. Penry was charged?

A Yes, sir.

Q Were you furnished also with an autopsy report?

A Yes, sir. I believe so.

Q You say you were furnished with two statements which reflected the name of Johnny Paul Penry?

A Yes, sir.

Q Were you also furnished any sort of summary in connection with the case?

A Yes, sir.

[2327] Q Who prepared that summary, if you know?

A Mr. Price.

Q Mr. Price. And did you have all that available to you at the time that you examined the Defendant, Johnny Paul Penry?

A Yes, sir.

Q Do you see Mr. Penry in the courtroom today?

A Yes, sir. I do. He's sitting behind Mr. Wright. He's wearing a green and white flowered shirt.

Q Your Honor, may the record reflect that the witness correctly identified the Defendant.

BY THE COURT: Let the record reflect that the witness identified the Defendant.

Q And where did your examination of the Defendant take place?

A At the Trinity County Outpatient Clinic, located here in Groveton.

Q And what period of time did you examine him?

A I evaluated him face to face for approximately one hour, but I also spent some additional time before I saw him reviewing the information made available to me.

Q All right, sir. Have you also had an opportunity [2328] to examine certain medical records in connection with Mr. Penry?

A Yes, sir. Mr. Penry has been evaluated—well, evaluated at one time in the past, and there were records available, because the evaluation occurred through our center, and I did review those records.

Q Do you know who had evaluated him in the past?

A Well, there was a discharge summary from Rusk State Hospital; there was also a psychological testing information that was available that had been done by a worker in our center. There was also a psychiatric evaluation by Dr. Peebles that he had performed in the past.

Q Do you know a Dr. Peebles?

A Yes, sir.

Q You say you had access to a previous examination that he had conducted on the Defendant?

A Yes, sir.

Q And did you have access to all of those medical records that you've just described at the time that you evaluated Mr. Penry on the 29th of November?

A Yes, sir.

Q Since that time have you been furnished with yet [2329] additional medical records in connection with Mr. Penry?

A Yes, sir. I have.

Q Have you had an opportunity now to review those records as well?

A Yes, sir.

Q Would you explain for the benefit of the jury how you went about conducting your evaluation on the 29th of November.

A What I did initially, since this was a court ordered evaluation, was to have Mr. Penry come into my office and in the presence of the psychiatric nurse that works that with me, I advised Mr. Penry that this was a court ordered evaluation and he was free to either answer everything or if he chose not to answer some statements, that was his right, but that anything he said might appear either in my written statement or in court testimony. I wanted to make sure he was aware of that. He acknowledged that he understood that, and the nurse also verified that he understood what this evaluation was about. I then proceeded to ask Mr. Penry a series of questions about his background. I asked him about his overall condition [2330] now as he understood it. I asked him if he understood the charges that were filed against him. I asked him if he knew who his lawyer was and what the function of a lawyer and a judge and the legal system was. I also asked him specifically about symptoms of mental illness, to get an idea if he was suffering from a mental illness at this time. I also asked him a series of questions about his judgment and whether or not he had the concept of knowing right from wrong. Also, I asked him questions about whether or not he might have been under the influence of any chemical of any sort that might affect his judgment. And I summarized it in a written report of my findings.

Q Did you also have an occasion to ask him about the offense with which he was charged?

A Yes, sir. I did.

Q Did you discuss that matter with him at some length?

A I didn't do much discussing. I asked Mr. Penry to discuss what he remembered about the day in question. Then he went into a presentation about what he remembered about that day.

Q Did he appear to have a recollection of what [2331] happened on the day of the event?

A Yes, sir.

Q And did you have an opportunity during that discussion to have available there the two statements which had been given to you?

A Yes, sir.

Q Did you have an opportunity to have available there with you during that discussion the offense report prepared by the arresting officers?

A Yes, sir.

Q The discussion that Mr. Penry or the details that Mr. Penry gave you, were they of a detailed nature, or were they of a sketchy nature?

(OBJECTION)

BY MR. WRIGHT: Excuse me, Mr. Keeshan and Dr. Vogtsberger. I'm going to object to this. May we approach the bench.

(Attorneys approach the bench)

(Discussion before the bench)

BY MR. WRIGHT: This is the oral confession made while the defendant was in custody—38.22.

BY MR. NEWMAN: Also as to evaluation for competency.

[2331A] BY THE COURT: I think he can ask related events but not the facts. I will sustain that objection on

that part. Otherwise, you have to prove whether or not he was previously warned.

BY MR. KEESHAN: I have not reached a point where I have asked an improper question. I think he objected to whether he thinks I was going to ask one.

BY MR. WRIGHT: I think it is obviously prejudicial even at this point.

BY MR. NEWMAN: We object to the District Attorney's attempt to do indirectly what he cannot do directly.

BY THE COURT: Sustain the objection. You may continue, Mr. Keeshan.

[2332] (Within Jury's Hearing)

BY MR. KEESHAN: May I proceed, Your Honor.

BY THE COURT: Yes, sir.

(Mr. Keeshan Continuing) To continue, Dr. Vogtsberger, did the Defendant, Johnny Paul Penry, appear to have any problem with his recollection on that occasion?

A No, sir.

Q Did you have ample time on the 29th day of November of last year to interview this Defendant?

A Yes, sir.

Q Could you have had additional time, if you so required or requested?

A Yes, sir.

Q Was there any limitation placed on you as to the time that you had him available there for interview and evaluation?

A No, sir.

Q Do you know what the legal test of insanity is in the State of Texas?

A Yes, sir. I believe I'm familiar with it.

Q With regard to whether or not this defendant had any mental defect or mental illness at the time of the offense, which was committed on the [2333] 25th day of October, 1979, did you reach any conclusion as to whether

he was suffering from any mental defect or mental illness on that occasion?

A It was my opinion that he was not suffering from any mental illness on that occasion.

Q All right. And does that apply to the term mental defect as well?

A Yes, sir.

Q And with regard to whether or not, of course, by virtue of any mental defect or mental illness, he was unable to know that his conduct was wrong did you reach any opinion in that regard?

A I did not feel there was any mental illness that would effect his judgment on that day.

Q I see. Did you reach an opinion as to whether or not the Defendant knew the difference between right and wrong?

A Yes, sir. I do feel that Mr. Penry does have the capacity or does have the knowledge of the difference between right and wrong.

Q And what about the latter part of the test whether or not the Defendant has the ability to conform his conduct to the requirements of the law that he allegedly violated?

[2334] A I think he does have the potential to honor the law. Yes, sir.

Q You think he does have the potential to honor the law. Are you familiar with the next part of that law which has to do with the fact that it is not a mental defect that a person repeatedly violates the law or acts in an otherwise anti-social manner?

A Yes, sir.

Q Do you see any documentation that reflected a possible finding of mental retardation from either the Rusk State Hospital or other treatment centers?

A Yes, there was evidence that on psychological testing Mr. Penry scores below the average as far as his intelligence, his IQ.

Q And did you have any opinion with regard to whether or not he was mentally retarded or not and what the possible basis or cause of that might have been?

A Yes, sir. I do have an opinion on that. There is a difference between a test score on a written examination versus how a person might function on a day to day basis. I certainly agree that he tests out on the IQ [2335] test as having below average intelligence, but I felt that overall his alertness and his understanding of what goes on with himself and with, you know, the social environment that he would not be diagnosed or fit into a category of being globally mentally retarded.

Q Was he able to converse with you in an appropriate manner?

A Yes, sir.

Q Did it appear to you that he understood you when you spoke to him?

A Yes, sir.

Q Did you see any sign of delusions or hallucinations?

A No, sir.

Q And for the benefit of the jury, would you explain what a delusion and hallucination is?

A These are terms used to describe symptoms that are usually seen in severe psychiatric illness. A delusion for example, is a false belief that cannot be shaken in a person, even when they are presented with the reality of the situation. To give a pretty straight forward example, if a person believes the world is flat and although he's presented over and over again [2336] with factual material that shows that not to be true, but they stick with that belief. That would be considered a delusion. A hallucination is any sensation a person might appear—might appreciate that really isn't there. One of the most common kind is what's called an auditory hallucination, and that means just hearing something that's not really there. Another example would be a visual hallucination,

seeing something that's not really there, like seeing the image of someone who really didn't exist or hearing the voice of someone who was not actually in a room with you. These are things we look for as far as severe mental illness.

Q Does Mr. Penry appear to be suffering from any of those symptoms?

A No, sir.

Q And are those symptoms sometimes present in persons with serious mental illness?

A Yes, sir.

Q Did you utilize the background information concerning the commission of the offense itself to assist you in determining whether or not the Defendant was sane on the 25th of October?

[2337] A Yes, sir.

Q Do you feel that that detailed information about the commission of the offense is useful to you in making an opinion as to whether or not the defendant was sane or insane at that particular time?

A Yes, sir. It's my opinion that the more information that is available the more accurate an opinion can be given.

Q And is it customary for you to be furnished that sort of background information when you attempt to determine whether or not a person is sane or insane for court purposes?

A Yes, sir. I'm not a lawyer, but as I understand it is, in fact, a requirement that these types of documents are presented to the examining psychiatrist at the time of the interview and evaluation.

Q All right, sir. And in looking at the confessions that were furnished to you and after evaluating this defendant, did you reach any opinion as to whether or not this defendant would be capable of giving a person the information contained in those two confessions?

A Yes, I felt like he could present that information.

[2338] Q Is there any other explanation you can give for the low test scores that were seen that might have led to the evaluation of mental retardation? Is there any other possible explanation of those matters?

A Yes, sir. I noticed on several occasions the testing psychologist who performed the examinations many times mentioned that Mr. Penry lacked social stimulation and intellectual stimulation. In other words, he wasn't given all the opportunities to learn and benefit from educational experiences that might have allowed him to test out at a higher IQ, and I agreed with that opinion that under a more stimulating environment his IQ might be significantly higher.

Q Well, if there were evidence that Mr. Penry as a child was somewhat of a behavior problem and that he was often locked alone in his room for periods of time, and that he was, in fact, withdrawn and kept out of school during a number of years, would that sort of information have any bearing on what you've just stated about whether or not he was stimulated intellectually?

A It certainly might have an effect on how he [2339] tests out on an IQ test. Yes, sir.

Q And does that tie in with what you said about the fact that his test scores might be lower as a result of that sort of environment?

A Yes, sir.

Q Dr. Vogtsberger, we've had testimony from another psychiatrist in this case who testified for the defense. I think he testified through questions of the defense attorney regarding the definition of an anti-social personality. Are you familiar with such a term, anti-social personality?

A Yes, sir.

Q And basically, without a full definition, what is that? What sort of phenomenon is an anti-social personality?

A All right. Let me clarify that the definition I use is the one approved by the American Psychiatric Association, and the definition that is used by the American

Psychiatrist is that an anti-social personality is a personality disorder, where a person repeatedly comes into conflict with society's rules or morals or standards. This is a repeated kind of problem or a lifestyle. The people do not usually tend [2340] to learn from experience, and they don't learn from punishment or other interventions. Their behavior tends to repeat itself.

Q Would such a phenomenon be classified as a mental illness or what is an anti-social personality?

A Well, by definition, it is a personality. In other words, it's part of a person's makeup or way of presenting themselves or dealing with the world on a day to day basis. So, in the true sense of the word, it's not a severe mental illness.

Q It's not a severe mental illness. And I'll ask you further, doctor, whether or not—is there a specific manual approved by the American Psychiatric Association which fully defines or specifically defines mental and behavioral disorders?

A Yes, sir.

Q And is there a definition of anti-social personality contained therein?

A Yes, sir.

Q And what manual or book or textbook contains those definitions?

A This is a manual called the Diagnostic and [2341] Statistical Manual # 2 that the American Psychiatric Association uses.

Q Do you happen to have a manual with you at this time?

A Yes, sir. I do.

Q Would you mind opening it and reading exactly, if you will, the definition contained therein of anti-social personality?

A The definition of anti-social personality: "This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable

of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible, rationalizations for their behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis."

Q Is there anything in that definition concerning the fact that an anti-social personality is one of high intelligence who is often able to [2342] hide his offenses for a long period of time?

A No, sir.

Q Is there anything in that definition which would lead you to believe that an anti-social personality would never sign a confession?

A No, sir.

Q Did you find any characteristics of Mr. Penry which were consistent with that of an anti-social personality?

A Yes, sir.

Q When you interviewed Mr. Penry, did you see any signs of guilt or remorse on his part?

A No, sir.

Q Doctor, I notice in your report that at the bottom of the second page you indicate that Mr. Penry is able to tell right from wrong, but that he is unable to control his impulses when there is something or someone that he wants. Can you explain further exactly what you mean in that area of your opinion?

A It was my feeling that he is impulsive and might do things that would be against society's norms or rules or laws, if it was to his benefit.

Q Is that part of the definition of anti-social personality that they are impulsive?

[2343] A Yes, sir.

Q Doctor, hypothetically speaking, if a policeman was watching the defendant, would he be able to control his conduct at that time, if he saw something or someone that he wanted?

A Yes, sir. I think that he would.

Q If other people were watching the defendant so that he knew that he would be detected when he committed an offense, would he be able to control his behavior at a time like that?

A Yes, sir. I think he would.

Q Doctor, you may have noticed at the top of both of those confessions that you were furnished, on the first page thereof, there were some legal warnings contained there. And they include the fact that the defendant had the right to remain silent, not to make any statement at all, and that any statement he did make could be used in court against him. From your evaluation of the defendant, do you believe that those warnings could be explained to him carefully and in a manner that he would understand?

A Yes, sir.

Q Those warnings as I recall them, further go [2344] on to state that the defendant has the right to have a lawyer present, either prior to or during any questioning or perhaps prior to and during any questioning. Do you think that could be satisfactorily explained and conveyed to the defendant so that he could understand that?

A Yes, sir.

Q The warnings go on to say that if he desires to talk that the interview can be terminated or stopped at any time.

A Yes.

Q Do you believe that that could be satisfactorily explained and conveyed to the defendant so that he understood that?

A Yes, sir.

Q And if the evidence showed that the defendant was read those warnings not once, but many times before he confessed, and that they were read to him by a magistrate, that is a justice of the peace over in Livingston and by several different peace officers and in fact, by the defendant's own father, Mr. Penry, do you think that he would be able to understand those warnings?

A Yes, sir.

[2345] Q We pass the witness, Your Honor.

BY THE COURT: All right.

CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Dr. Vogtsberger, you formed your opinion concerning this defendant on or about November 29, 1979, is that correct?

A Yes, sir.

Q All right. You'll admit that at that time you had an incomplete medical history of him, didn't you? At that time?

A Yes, sir. I did not have every piece of record on him.

Q All right. As a matter of fact, you did not have anything at all from the University of Texas Medical Branch?

A No, sir.

Q You did not have anything at all from the Mexia State School?

A No, sir.

Q You had nothing at all from the Austin State Hospital?

A No, sir.

Q And I believe you told me before, you had out of this packet of papers from the Rusk State [2346] Hospital, you had two pages?

A Yes, sir.

Q Now, at the time that you rendered your opinion, back in November, you were not then certified by the American Board of Psychiatry and Neurology?

A No, sir. I was not.

Q But you are now?

A Yes, sir.

Q As of January of this year?

A Yes, sir.

Q Newly certified, isn't that fair to say?

A Yes, sir.

Q You were requested to come here and testify today by Mr. Price?

A Yes, sir.

Q At the time that you rendered your opinion, you had no knowledge whatsoever that he had ever been diagnosed as having organic brain damage, did you?

A No, sir.

Q You had no knowledge whatsoever that he might have been damaged at birth?

A That's incorrect. The Rusk State Hospital records did summarize his background and mentioned [2347] the past evaluations.

Q What did it say in that regard?

A It said that he was felt to be mildly mentally retarded and to have a behavior disturbance.

Q No mention was made of any brain damage at birth in the Rusk State records, the two pages that you had, is that true or false?

A That's true.

Q You said that you spent some time examining whatever records you did have on Mr. Penry before performing your examination up here in Groveton?

A Yes, sir.

Q Could you give us an estimation of how much time you did spend?

A I think it was an hour and a half.

Q All right. You were aware at that time that Johnny Paul Penry was charged with capital murder?

A Yes, sir.

Q And you were aware that capital murder carries a possible death penalty?

A Yes, sir.

Q You were aware though that he had spent some time in the Mexia State School at the time you [2348] formed your opinion, didn't you?

A Yes, sir.

Q But you didn't request any of their records, did you?

A No, sir.

Q You were also aware that he had spent some time in the Austin State Hospital at the time you formed your opinion?

A Yes, sir.

Q Did you request their records?

A No, sir.

Q You just testified a few minutes ago that the more complete records you have, the more accurate your opinion can be, didn't you?

A Yes, sir.

Q Does the psychiatrist have any better way to detect guilt or remorse in a person than a ordinary person?

A Yes, sir. I think so.

Q All right. Did you use those techniques?

A Yes, sir.

Q How did you—did you ask him "do you feel guilty" "do you feel remorseful"?

A I asked him a series of standard questions that are recommended for the use of psychiatrists [2349] as far as questions regarding various types of acts or behavior to see the person's response.

Q Okay. What did you ask him?

A I asked him if he possessed something and something was taken away from him without his knowledge,

how would he feel about that and would he consider it a right or wrong act? That was one of the questions.

Q All right. What else did you ask him?

A I also asked him if he felt like physically injuring or possibly killing someone was a right or wrong act?

Q And what did he say?

A He said it was wrong.

Q What else did you ask him?

A I think I asked him another question similar to the first one regarding if something else happened to him that he did not feel was fair, what did he think about that.

Q What did he say?

A He said he thought that was wrong for someone to treat him unjustly.

Q Now, you talked about the element of control or being able to conform one's actions to the [2350] requirements of law.

A Yes, sir.

Q And you gave an example of a policemen being at his elbow.

A Yes, sir.

Q And you—do you use that as the standard for determining whether or not a person can conform their actions to the requirements of law?

A No, sir. There's many ways to look at a person's behavior to determine how they might behave.

Q All right. You didn't mention that on direct. Did you?

A I was not asked to comment on that.

Q You did speak with Mr. Keeshan and Mr. Price about how you would testify before you came in here this morning, didn't you? This afternoon.

A Yes, sir.

Q You had a conversation with them over lunch?

A Yes, sir.

Q Now, there are, don't you agree, doctor, people who are in fact—in fact, do not know that their conduct

is wrong or that are unable to conform their conduct to the requirements of law. That is a possibility, isn't it?
[2351] A Yes, sir. It is.

Q All right. And then you mentioned hallucinations and delusions.

A Yes, sir.

Q Obviously, I would think, those people would fit the category of not knowing their conduct was wrong and being unable to conform their actions to the requirements of law. That would be true, wouldn't it?

A It would depend on the situation. In other words, some people have had mental symptoms like that and with appropriate treatment, they may not have those symptoms any more and they may—

Q Leaving out the element of time and change of condition, if a person has a condition at a particular time, then he fit the category, that I spoke of of not knowing his conduct was wrong and being unable to conform his conduct to the law?

A If those symptoms were severe.

Q If they presently occur.

A I agree.

(OBJECTION)

BY MR. KEESHAN: Your Honor, I object to counsel talking over [2352] the witness answer. He said, "if they were severe." Counsel is talking over his response.

BY THE COURT: Just ask him questions.

(Mr. Wright Continuing) Excuse me. Now, the person's in the category of the anti-social personality, are they mentally ill or not?

A Not in the true sense of the word. No, sir.

Q Okay. Now, earlier, you said they were not severely mentally ill?

A No, sir.

Q All right. Is it a matter of degree? Is that what we're speaking of here? Is that why you use the word severely?

A No, sir. Not necessarily. Some people can have personality disorders, and they not ever be led to have psychiatric treatment or cause any problems.

Q Now, based on your examination, you evidently believe that Johnny Paul Penry was perfectly capable of giving a statement such as the two that are in evidence and that you had before, isn't that true?

A Yes, sir.

[2353] Q And so that is a part of the factual underpinnings of your diagnosis, isn't that true?

A I didn't give a diagnosis on Mr. Penry. I was not asked to do that.

Q All right, of your opinion?

A That was part of the data presented to me, yes, sir.

Q Was it an important part?

A It was as important as anything else I reviewed.

Q Well, you claim it's the law that you had to be provided it?

A Right.

Q Now, in that statement, the statement that you did use, are there indications in there that the offense with which he is charged was, in fact, planned?

A Yes, sir.

Q And aren't there statements in there of evasive tactics that he used during the time that he was committing the offense, so as not to be detected?

A Yes, sir.

Q Were those factors that you found in those statements important in making your opinion?

A Yes, sir.

[2354] Q Those then are important indicators of whether or not a person knows that his conduct is wrong?

A Yes, sir.

Q And so, you were relying at least in part of those indicators?

A Yes, sir.

Q If it were to be shown to you, either that Johnny Paul Penry did not or could not compose those parts of the statements, would that effect your conclusion?

A Not my overall conclusion. No, sir. I think there is enough evidence otherwise for me to still stick to my original opinion about him.

Q It would reduce your confidence level though in your opinion, wouldn't it? If that could be shown?

A I guess there's a possibility of that.

Q Well, I mean, your opinion is based on certain facts that you find. You find a set of facts. Right?

A Yes, sir.

Q You form your opinion based on your knowledge and your knowledge of those facts. If I start taking away facts, you're going to have to at some point become less confident in your opinion, [2355] isn't that correct?

A That's true, Yes, sir.

Q We'll pass the witness.

BY THE COURT: Do you have any more questions, Mr. Keeshan?

BY MR. KEESHAN: Yes, sir.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. KEESHAN:

Q Did you have an opportunity in forming your opinion also to use the information that Mr. Penry gave you as well as the information in the confessions?

A Yes, sir.

Q As well as the information in the offense reports?

A Yes, sir.

Q Now, you've testified as to the records that you did have and did not have, and much has been made out of the fact that you did not have some records from Galveston State Hospital, made in 1965, that you may not have had records from the Mexia State School although you knew that he had been there, which might have been made in 1968. You did not have the complete records from Austin State Hospital and the Rusk State Hospital from 1973, is that correct?

[2356] A That's correct. Yes, sir.

Q But you did have some records from the Mental Health and Retardation and from Dr. Peebles, another psychiatrist, and had those records been made closer to October 25, of last year than the other records I mentioned to you?

A Yes, sir.

Q Had, in fact, Mr. Penry been examined, according to those records, had Mr. Penry been examined by other persons within the Mental Health and Retardation Office during 1979, for example?

A Yes, sir.

Q And when you interviewed Mr. Penry, it was what, approximately a month, a little over a month after the 25th of October?

A Yes, sir.

Q Did you have other examinations available to you that had been conducted a short time before October 25th?

A I believe Mr. Penry had been scheduled to come in for some counseling sessions through a center there in Livingston.

Q All right, sir. Now, if you were going to make an opinion as to what the defendant's [2357] state of mind was on October 25th, 1979, would the records that were made at a point closer in time to October 25th be more important to you than records made at some remote time?

A Yes, sir.

Q Furthermore, have you had an opportunity now, after your examination to examine the other records that Mr. Wright referred to and layed up there on the table in front of you?

A Yes, sir.

Q Is there anything contained in those records

A which has caused you to change your opinion about Mr. Penry's state of mind?

A No, sir.

Q Mr. Wright also pointed out the fact that Mr. Price and myself had a conversation with you during the noon hour before you took the witness stand.

A Yes, sir.

Q Have you ever had an occasion to be talked to by Mr. Wright before?

A Not directly, but I have received written communication from him. Yes, sir.

Q What about in testimony in this courtroom? Have you ever had occasion to talk to Mr. [2358] Wright there?

A Yes, sir. In this courtroom at a time in the past.

Q Was that a fairly detailed conversation? The one that took place in this courtroom.

A The testimony? Yes, sir.

Q And before you talked to myself and Mr. Price, had you already testified in front of Mr. Wright?

A Yes, sir.

Q Had you already made your written reports of your examination?

A Yes, sir.

Q Pass the witness, Your Honor.

RE-CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q You're aware then from your testimony that Mr. Penry was receiving mental health care in Livingston almost right up until the time of the alleged offense in this case, aren't you?

A No, sir. He was scheduled to come in for his appointments, but as I remember the records he was not actually keeping those appointments.

Q All right. Someone though, had perceived a [2359] need for mental health care, even up until the time of the offense, is that correct?

A Yes, sir. He was referred for counseling. I don't remember exactly who had suggested that initially,

whether it was someone involved with the legal profession or the Texas Rehabilitation Commission, I'm not sure which of those were involved.

Q All right. Now, you made reference to an earlier diagnosis by Dr. Peebles, and you also say that you had no knowledge of any abnormality in his birth or brain damage from the time of his birth. Those are both true, aren't they?

A Well, by definition, the mental retardation that he was diagnosed as having, by definition mental retardation begins in the early years of life, in other words, within the first year or two. So, the mental retardation obviously had been present and was documented in the Rusk State Hospital discharge summary.

Q All right. But you knew of no particular problems regarding his birth, did you?

A No.

Q And, in fact, the diagnosis of Dr. Peebles [2360] was also done with the belief that there was no history of abnormality at birth?

A Apparently that's Dr. Peebles's statement.

Q If a person does have organic brain damage, either from birth or from a very early time in their life, does it ever get better?

A It depends on what the actual cause is. Some get better; some get worse, some stay the same.

Q All right. What about mental retardation?

A You said that the mental retardation was a possible indicator of some problem early on in life, isn't it?

A Yes, sir.

Q And so, you can tell from late in life that that's one of the possible things that might have occurred early in life?

A Yes, sir. That's a possibility.

Q You were able to do that earlier on the witness stand, weren't you?

A Yes, sir.

Q Now, do you have that book that gave you the definition of the anti-social personality?

A Yes, sir.

Q Do you still have it there? May I look at [2361] it, please?

A Sure.

Q All right. The first sentence that you read in that definition is that: This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. Now, how does that differ from the category of persons who do not know that their conduct is wrong or who cannot conform their conduct to the requirements of law? Can you differentiate there?

A Well, I think the difference is that the anti-social personality knows the difference between right and wrong but goes ahead and does it anyway.

Q Now, one of the factors in this definition is the inability to learn from experience, isn't that correct?

A Yes, sir.

Q It says here "they tend to blame others or offer plausible rationalizations for their behavior." That's also a part of the definition, isn't it?

A Yes, sir. There is a tendency toward that.

[2362] Q All right. Now, tell me this. Can a person with extremely high intelligence exhibit the anti-social personality?

A Yes, sir. That's true.

Q Do the terms anti-social personality and the group of persons which I don't have a name for but which I keep saying as those who do not know their conduct is wrong or cannot conform their conduct to the requirements of law—do those groups overlap?

A It sounds like the second definition that there might be some overlap. Yes.

Q In other words, the person who has the anti-social personality could be also legally insane?

A There's a possibility of that. Yes, sir.

Q So, the fact that a person exhibits some of the characteristics of the anti-social personality does not mean he is sane, does it?

A Not in and of itself. No, sir. That has to be decided in a court of law as far as legally insane.

Q When it gets too tough, the professionals will throw it off to a jury, is that what happens?

A Yes, sir.

[2363] Q However, this business of learning—I'll pass the witness.

BY THE COURT: Do you have any more questions, Mr. Keeshan?

BY MR. KEESHAN: Yes, Your Honor, I do.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. KEESHAN:

Q Dr. Vogtsberger, I believe the record will show we had testimony yesterday from a Dr. Garcia, a psychiatrist, who testified that mental retardation was always a symptom or a result of some organic brain damage or organic brain syndrome. Is that consistent with your opinion?

A No, sir. I disagree with that opinion.

Q You disagree with that?

A Yes, sir.

Q Do you find it significant that Johnny Paul Penry might have forgotten or not recalled the name of Dr. Jose Garcia a few minutes after he'd been introduced to him?

A No, sir.

Q Mr. Wright asked you about the fact that Johnny Paul Penry was being seen by some counselor in [2364] the MH/MR unit—is that correct?—

A Yes, sir.

Q unit, perhaps over in Livingston, before the 25th of October. Is it common for persons without mental

illness to be counseled occasionally by psychologists, counselors, or psychiatrists?

A Yes, sir. That's true.

Q Have you, yourself, counseled or evaluated a number of people who did not have mental illness?

A Right. They might have a situational problem, a problem with their work or with their marriage, or just making an adjustment to their current living situation and they might be involved in counseling.

Q Do you recall now, independently from those records that you reviewed from MH/MR, those which might have been accomplished shortly before October 25th, whether or not the defendant was being counseled because of a specific mental illness or because of a situational problem?

A As I remember, the counseling was being ordered to help him make an adjustment in the [2365] community, job placement, things like that.

Q I pass the witness.

BY THE COURT: Do you have any more questions, Mr. Wright?

RE-CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q The type of people that would be doing this counseling, would it be people with training in the field of mental health care, wouldn't they?

A Yes, sir. That's true.

Q And the reason they use that kind of people is because they've got people with some degree, at least, of mental problems, isn't that right?

A Yes, sir. But not always.

Q Pass the witness, Your Honor.

BY MR. KEESHAN: Just a moment, Your Honor.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. KEESHAN:

Q Dr. Vogtsberger, I forgot about the fact that Mr. Wright asked you about your certification.

A Yes, sir.

Q Would you explain for the benefit of the jury how you were able to practice psychiatry without— [2366] for several years before you got your certification?

A Yes, sir. The board certification process is totally voluntary. It's like a person doesn't have to go get a college degree or other types of degrees. I attended an approved residency in psychiatry that's approved by all of the various governing boards and the medical examiners, etc. and completed that. Then on my own, I chose to go for this additional certification. It takes about two years to obtain this certification, and I was about half way through the process, when I evaluated Mr. Penry.

Q Pass the witness.

RE-EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Dr. Vogtsberger, can a person in Texas who has been to medical school and graduated and so forth, can he then begin to hold himself out as a psychiatrist?

A Yes, sir. He could label himself as being any type of medical specialist in any field of medicine.

* * * *

[2373] FELIX PEEBLES, JR.

the witness hereinabove named, after first being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you state your name for the jury, please?

A Dr. Felix Peebles, Jr.

Q What's your occupation or profession, sir?

[2374] A M.D. Psychiatrist, Specialty in Psychiatry.

Q Would you briefly summarize your educational qualifications for the jury, please?

A Since high school, a Bachelor of Science degree, a Doctor of Medicine, a Master of Surgery, and then a three psychiatric residency.—Three year.

Q Where did you receive your M.D. degree?

A McGill University in Montreal, Quebec, Canada.

Q What year was that?

A 1938.

Q Did you practice medicine for a while, general medicine?

A Yes, I did general medicine and surgery for twenty-six years, before going into psychiatry.

Q And would you tell the jury about your training and experience with regard to psychiatry in particular?

A Well, since getting out of residency, that was 1964-67, and since then have been assistant chief of psychiatry at the Temple Veterans Administration Center, clinical director at Nevada State Hospital, during that period of time I was consultant to the five district courts and did most of the psychiatric evaluations for the five district courts in Reno. I was [2375] consultant to the Nevada State prison and served on a panel to interview inmates who were coming up for parole, and the panel made recommendations to the parole board concerning each one individually. I was psychiatric consultant to the Veterans Administration Hospital in Reno, Nevada, which was the only VA Hospital in the state. I was consultant to Whittenburg Hall which was a juvenile detention home in Reno. Then I was clinical director at

Rusk State Hospital for three and a half years. Then clinical director of Deep East Texas community mental health center for three years, and then went to Beaumont and worked at Beaumont State Center as director of psychiatric services and operated the twenty-four bed inpatient intensive care unit and operated a crisis line and did screenings for the admittants from Jefferson County.

Q Where are you presently employed?

A Presently with the Texas Department of Corrections, since September 1979.

Q And you mentioned Rusk State Hospital. What years were you at Rusk State Hospital?

A From September 1971 until January 1975.

[2376] Q Do you know Johnny Paul Penry?

A Yes.

Q Do you see him seated in the courtroom, doctor?

A Yes.

Q Could you point him out to the jury, please?

A That's him right over here in the white shirt.

Q Your Honor, may the record reflect that the doctor identified this defendant.

BY THE COURT: Let the record reflect that the witness identified the defendant.

Q Dr. Peebles, have you ever had an occasion to examine this defendant in your capacity as a psychiatrist?

A Yes.

Q Can you recall maybe the first time that you had an occasion to examine him?

A The first time I examined him was in Rusk State Hospital about October of 1973.

Q And subsequently did you have another occasion to examine him aside from the Rusk State Hospital?

A Yes, sir. On May 19, 1977, here at the Groveton Outpatient Clinic.

Q And then, more recently, have you had an occasion to examine him?

[2377] A Yes, on March 13, of this year, here in Groveton.

Q Was that examination at my request?

A Yes.

Q Dr. Peebles, back in 1973, the jury is aware—in fact, all of these Rusk State Hospital records have been introduced. But briefly, could you tell the jury what your diagnosis may have been with regard to this defendant back in 1973, when you saw him at Rusk State Hospital?

A Well, that he had some mental retardation and we gave him the benefit of the doubt of the maximum amount of the disability that he may have, and called him moderate at that time. He was tested as I recall by two psychologists and one as I remember did call him moderate and I think the other one kind of leaned toward mild degree of retardation. And it was my opinion at that time that he was not mentally ill, but he was mentally retarded, and since we try to give young people as mild a diagnosis as possible, he was called adjustment reaction of adolescence. He had a lot of behavior problems, acting out, [2378] aggressive and combative behavior. He was very difficult to manage during that period of hospitalization. Rusk State Hospital accepted him on transfer—

BY THE COURT: Dr. Peebles, excuse me. We don't have a PA system and some of the jurors are having difficulty hearing you, so please speak up just a little bit.

A All right, sir. Rusk State Hospital accepted him on transfer from Austin State Hospital, and I think he was committed to Austin from a county in their catchment area and then they found that he had a residence in one of the counties that was in the Rusk catchment area, so they transferred him to Rusk on that basis. And he was there from about October 3, 1973 to, I believe, he was discharged about January 4, 1974.

Q And at that time, doctor, did I understand you correctly to say that you did not find any significant mental illness at that time?

A That's true.

Q Then in 1977, when you examined the defendant [2379] again, I believe at that time you were working for the Deep East Texas Mental Health/Mental Retardation Services?

A Yes.

Q And you examined him in 1977. What were your findings at that time?

A He showed some degree of retardation and I estimated his IQ from his clinical level of functioning to be full scale IQ between 50 and 60. He wasn't tested with psychological tests at that time. And, of course, I gave him the benefit of the 50, which was at the bottom of my estimated range, which would be a moderate degree of mental retardation. Now, like 52, or if you gave him the mid-50's this would put him into the mild degree of mental retardation. 31-51 is considered moderate and 52-67 is considered mild, so anything over 51 would be mild, so I preferred to put him at the bottom of the estimated range and so go with the moderate degree of retardation and give him every benefit of the doubt as far as his ability. He also had a lot of anti-social features at that time, and exhibited much difficulty in his history and in his [2380] verbalization of having been in conflict most of his life. He had a very bad life generally, bringing up. He had been socially and emotionally deprived and he had not learned to read and write adequately. He can sign his name, but he'd been tried in school, in special ed, in a number of special schools, and due to his behavior they were unable to maintain him in any of the schools was my understanding.

Q At that time, aside from the anti-social features of his personality and the mental retardation, did you find any other significant mental disease or defect?

A No.

Q And with regard to these anti-social features of his personality, is that a mental disease or defect, doctor?

A No. Anti-social personality is considered a character disorder. It's not a true mental illness.

Q Then, when did you say was the last time you had an occasion to examine this defendant? I believed you gave a date.

A March 13, of this year.

Q And where did you examine him at that time?

[2381] A In the jail here in Groveton.

Q And how long did you spend with him?

A About an hour and a half.

Q Were you furnished with any other information such as offense reports, statements that he may have purportedly given and things of this nature?

A Yes.

Q Were you also furnished with any of his prior records, medical records?

A Yes.

Q Would you tell the jury briefly what your interview generally consisted of, without going into any of the details of it.

A Well, of observing him and talking to him, and going through the standard psychiatric interview, and asking, you know, what his situation was at the present time and what had been going on, and see how well aware he was of his environment and what his situation was at the present time.

Q Doctor, based on your prior opportunities to observe the defendant as well as your examination on October (sic) 13, 1980, as well as your examination of these records and based on your [2382] prior experience in such matters, were you able to arrive at an opinion as to this defendant's sanity within the meaning of the law as pertains to the offense with which he is charged that was committed on October 25, 1979?

A Yes. It was my opinion that he was sane and competent at that time.

Q All right, sir. And specifically, doctor what was your opinion with regard to whether or not the de-

fendant knew that his conduct was wrong on October 25, 1979?

A It was my opinion that he did know that his conduct had been wrong.

Q And, doctor, likewise with regard to whether or not he could conform his conduct to the requirements of the law on that date, what was your opinion?

A I think that he could conform his activities to the law, when he desired to do so.

Q In other words, it would be up to him?

A It was up to him whether he conformed or whether he didn't.

Q What was your diagnosis as to his condition at this time with regard to the anti-social features of his personality?

[2383] A Well, it is my opinion at this time that he shows not only anti-social features, but he has developed into a full-blown anti-social personality.

(OBJECTION)

BY MR. WRIGHT: Excuse me, I'm going to object right here. Judge, I don't think this man is an expert in anything except mental illnesses and defects. He says he doesn't have any mental illnesses or defects. If he's going to give an opinion on anything outside that area, he's outside his area of expertise and it's not allowed.

BY THE COURT: Overruled the objection.

(Mr. Price Continuing) What was your diagnosis with regard to the anti-social features, doctor?

A That is an anti-social personality and once a person settles in certain—

(OBJECTION)

BY MR. NEWMAN: If the Court please, we object to this line of testimony. It is highly prejudicial at this stage of the trial and immature, and it's [2384] improper for any purpose and incompetent at this time. May we approach the bench?

BY THE COURT: Yes, sir.

(Attorneys Approach the Bench)

BY MR. NEWMAN: The District Attorney is attempting to get in punishment phase now indirectly and attempting to show his future conduct which is not an issue at this stage of the proceeding and highly prejudicial.

BY MR. PRICE: I am not asking his intentions.

BY THE COURT: Admonish him not to get into any.

BY MR. NEWMAN: Out of the presence of the jury.

BY MR. PRICE: I'll go back to the date of the offense.

[2385] BY THE COURT: Sustain the objection.

(Mr. Price Continuing) Doctor, specifically as of October 25, 1979, based on your examination, what was your findings with regard to his status along the line of having anti-social personality features?

A Well, it was my opinion that he is an anti-social personality.

Q All right. Tell the jury what an anti-social personality basically is, please?

A Well, an anti-social personality is an individual who has much difficulty with his inter-personal relationships. They lack the ability to love and be loved. They are concerned primarily with immediate gratification of their impulses without regard for others or even without regard for themselves at some later point. It's just to satisfy what they want at the moment without looking to tomorrow to whatever it might mean to anyone else or even to them. They have no remorse or regret for offenses if they have committed. They do not seem to learn from the mistakes that they make and continue to keep making the same types of mistakes over and over.

[2386] Q Is there anything in his medical history that would bear this type of finding out?

A Well, back early in life, the history listed that he had temper tantrums, setting fires. He got quite a bit of excitement out of setting fires. He exhibited cruelty to animals, cruelty to his peers, and had much difficulty in generally with all of his interpersonal relationships.

Q Would this be consistent with the ultimate development of an anti-social personality?

A Yes.

Q Doctor, there has been some prior testimony here with regard to two statements that this defendant allegedly gave the police. Were you furnished with copies of those statements?

A Yes.

Q Have you had an opportunity to review them and read them through?

A Is this the statement on October 25, 1979?

Q Yes, sir. And then another one. I'll show you specifically what's been introduced in evidence. State's Exhibit Number Forty-Eight-S with some deletions is a copy of one of them.

A Yes, I've—

[2387] Q State's Exhibit Number Twenty-Seven is—

A Yes, sir. I've seen those.

Q Doctor, there has been some prior testimony to the effect that this defendant did not have the mental capacity to relay a story such as contained in those statements. What would your opinion be concerning that?

A Well, it's my opinion that he does have the capacity to relate this story.

Q And doctor, based on your examination of March 13, 1980, as well as your past examinations of this defendant and the review of his records, do you have an opinion as to whether or not he has been suffering from any type of mental illness on October 25, 1979?

A It's my opinion that he was not suffering from any type of mental illness on October 25, 1979.

Q Doctor, is an anti-social personality—is that considered a mental illness or a mental defect?

A It's considered a character disorder—

Q Not mental illness?

A Not a true mental illness.

Q Pass the witness.

[2388] CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Dr. Peebles, your specialty then is psychiatry?

A Yes.

Q And you did practice general medicine for thirty-six years before you switched over to psychiatry?

A Twenty-six years.

Q Twenty-six years. Do you have any voluntary certifications in the field of psychiatry?

A No, I've never taken the boards, the American Board of Psychiatry and Neurology. I've never applied for certification.

Q Doctor, you formed your opinion that you expressed today, back on—concerning his mental status on October 25th of 1979, you formed that opinion on March 3, 1980, isn't that true?

A March 13th, 1980.

Q March 13th. Isn't it true that although you had available to you all the medical records that you just merely glanced through them before you formed your opinion?

A I didn't have time to read all the material thoroughly that was furnished me at the time, before coming into the courtroom.

[2389] Q You testified that, with regard to Mr. Penry's ability to conform his actions to the law that it was up to him. In other words, you say he could conform if he tried?

A Yes.

Q All right. You talked about an anti-social personality as a character disorder. Now, then I would assume that it was also be possible for a person who exhibited the characteristics of an anti-social personality to also be legally insane, isn't that possible?

A It's possible for anyone to go insane, as far as that goes.

Q All right. But the fact that he may exhibit some anti-social characteristics does not preclude him from being insane, does it?

A No, it doesn't. It doesn't make him insane or you can't say that he will never become insane on the basis of his anti-social personality.

Q In fact, it's totally unrelated?

A Yes, the personality—his psychotic thought process or mental illness would be totally unrelated.

Q Let's talk about impulsiveness and gratification [2390] as a part of the traits that you claim he has and also as part of the typical and anti-social personality. You remember that line of questioning and your answers, don't you?

A Yes.

Q Now, you say that he might even hurt himself in order—in the long run in order to gratify some short run desire, is that correct?

A That's true.

Q So, then if he were in an uncomfortable position or something like that, he might say whatever was necessary to get him out of that position without regard to what he was saying, is that possible?

A Well, I think he knows what he says and has control over what he says.

Q That's not the question.

A Well, would you repeat your question.

Q Would the Court reporter please read it.

(Court reporter read previous question of counsel)

A Well, he may, you know. This applies to anyone. He may under certain circumstances say things that he would not say under other circumstances.

[2391] Q How does the mental retardation bear on that?

A Well, I don't think it has any bearing other than it makes him function, you know, a little on the dull side and his judgment and insight leave a lot to be desired. His impulse control is poor, but he does, you know, know what he does and I think is in control of himself.

Q His impulse control is poor?

A His impulse control is poor?

Q Is that what you said?

A Yes.

Q And that comes partly, at least, as a result of his retardation?

A Primarily the anti-social part of his personality.

BY MR. NEWMAN: May I ask him a few questions?

BY THE COURT: Yes, sir.

QUESTIONS BY MR. NEWMAN:

Q Doctor, what branch of the Texas Department of Corrections are you now in?

A I'm at the Ramsey Unit.

Q Are you practicing psychiatry there or medicine?

A Some of both. Psychiatry and medicine.

Q But primarily what are you doing? Primarily [2392] medicine?

A I'm doing quite a bit of medicine. I'm the only doctor there, so I do whatever they need when I'm there.

Q Although you have had some training and have practiced psychiatry, you are now back in your old profession of practicing medicine, is that not true?

A Well, when you specialize, you don't give up any part of your M.D.

Q Well, that isn't my question here. At the present time—

A Yes, I'm practicing some medicine and I always will. I'll always be a doctor, an M.D.

Q Doctor, do you know of your own knowledge who has been the head of the Psychiatric Department of the Texas Department of Corrections for the past year?

A Yes.

Q Who?

A Dr. Jose Garcia.

Q Dr. Jose Garcia?

A Yes.

Q He's quite a well-known psychiatrist, is he not, sir?

[2393] A Well, I'd say, I've known him for a long time. I'd say average. I don't think he's real outstanding. That's only my personal opinion.

Q I see. Have you ever worked under him?

A I've worked with him, and I had an opportunity to work under him and I declined it.

Q No further questions.

(State Rests)

BY MR. PRICE: The State rests.

BY THE COURT: Dr. Peebles, you can step down now, and you can be excused.

BY DR. PEEBLES: Thank you, sir.

BY THE COURT: Do you have any rebuttal witnesses?

BY MR. WRIGHT: I have Dr. Garcia, but I'm surprised that we're through so early with Dr. Peebles. I told him to be ready about 1:00. I don't know if I can have him here any earlier or not. I can try.

BY THE COURT: Go ahead and call him and see. At this time, the State has rested and the [2394] Defense has advised me that they have one rebuttal witness. We'll recess. You'll need to go into the jury room and stay in there until we get ahold of the witness on the phone. We may recess from now until lunch. But you're again admonished not to discuss this case among your-

selves or with anyone else. If anyone attempts to discuss it with you, you're to report it to me. You can be excused to the jury room. Don't leave there until I come in there and tell you when to come back.

(OUT OF JURY'S HEARING)

By MR. KEESHAN: Your Honor, the State wants to offer a motion in limine to prevent the defense from asking repetitious questions and rehashing all the evidence they've already presented from this witness. They should limit it strictly to rebuttal evidence as would be proper. [2395] BY THE COURT: All right. I think it would be better to object if they go into repetitious questions. This would—

BY MR. PRICE: Well, the reason for our motion, Judge, is they could very easily place us into a very difficult position just starting to ask repetitious type questions and make us stand up and object to each one of them and make this jury think we're trying to keep something from them.

BY THE COURT: All right. Mr. Wright and Mr. Newman, you're instructed not to go into repetitious questions. If you feel there're beginning to do this, you come back up here and offer your Motion in Limine then.

BY MR. WRIGHT: Let me tell you. The only thing I think that might possibly come into that category that I can think of is this: It's one of those tests from the Mexia State School which the results on [2396] the verbal test were 55 and the performance test were 55 and he had earlier testified that when you have a gap, that's indicative of organic brain damage. And he testified on cross with them that—

BY THE COURT: They were the same.

BY MR. WRIGHT: that it wasn't inconsistent. We would like to explain that, but we're not going to go back over all that stuff before. We don't expect to be trying to duplicate all of that stuff. Now is that excluded or not?

BY MR. NEWMAN: We're going to object to the Court limiting our recall of this witness by a motion in limine, as we think the proper method in the event we overstep the bounds on that would be by the objection on the part of the State's attorney at which time the Court would rule on that.

[2397] BY THE COURT: Mr. Newman, I'm not granting their motion in limine. I'm telling them that if they feel like you get into repetitious questions, then you can come back up here and we'll recess the jury and they can make the motion in limine again.

BY MR. WRIGHT: I don't think it's going to be a problem.

BY THE COURT: Bring the jury in.

(JURY SEATED IN THE JURY BOX)

BY THE COURT: Ladies and gentlemen of the jury, you heard the State's rebuttal witness, Dr. Felix Peebles, this morning earlier, before we recessed. At this time, the Defense has called one rebuttal witness, and we'll proceed with the testimony of Dr. Garcia. Dr. Garcia was sworn when he testified earlier last week in this trial. You can proceed, Mr. Wright.

**TESTIMONY FROM THE TRIAL ON THE MERITS
OBJECTION TO CHARGE ON PUNISHMENT AND
ARGUMENT AT PUNISHMENT PHASE CONTAINED
IN VOLUME 17 OF THE STATEMENT OF FACTS
OF THE TRIAL**

* * *

[2398] JOSE G. GARCIA

(Previously sworn and testified. Recalled as rebuttal witness for the Defense)

QUESTIONS BY MR. WRIGHT:

Q Would you state your name, please?

A My name is Jose J-O-S-E, middle initial G., last name Garcia G-A-R-C-I-A.

Q Are you the same Dr. Garcia that earlier testified in this case?

A I am.

Q In the interest of time, I won't ask you to go back over your qualifications. You and I have spoken since the last time you testified here, haven't we?

A Yes.

Q Now, the last time you testified, you were cross examined by Mr. Price, I believe, regarding one of the results of a psychological test from the Mexia State School. Do you recall that line of questioning?

A I do.

Q Okay. And if I recall correctly, the results on the verbal test were 55, on this one that we're speaking of, and the performance test was also 55.

A True.

[2399] Q All right. And the full scale results were shown to be 51.

A Correct.

Q You were asked about this by one of the District Attorneys, isn't that correct?

A That is correct.

Q You said that those results were not in conflict with your overall opinion, isn't that true?

A That is correct.

Q Earlier then, you had testified that when you had a gap between the performance results and the verbal results in an amount of at least ten points that that was evidence of organic brain damage.

A If I might rephrase the question. I said that there were two possible answers for that. One, more probable than the other. That it can be caused by severe psychotic functioning and the other, which is the most probable, severe organic impairment.

Q Okay. But you've ruled out the severe psychosis?

A I have.

Q Now, what explanation then do you have for this particular test result?

A There are only two possible explanations in my [2400] opinion. The possibility of a typographical error or the possibility of error in scoring. Either one of the two could explain the difference in scoring. It is in my opinion not probable and more than that, even approaching impossibility to have the same score in verbal as well as performance in intellectual functioning. That is almost a nonexistent possibility.

Q Tell me. How is this full scale score supposed to be obtained?

A Well, there are tables that generally mean an average, but there is a standardization procedure that is used in the Wechsler Adult Intelligence Scale, which measures the performance and the verbal IQ and then computes the full scale scoring. But normally it is close to an average of the two readings, but there is a slight difference between the average and the tables. So it is not always an average exactly, but it is pretty close to an average.

Q But now, if these two scores had just been averaged, since they are the same, the average would also be 55?

A True.

Q But the full scale that we have is 51, is that [2401] correct?

A 51.

Q Now, another psychiatrist has testified that he didn't find any evidence of guilt or remorse in Mr. Penry, in his examination. Is that consistent or inconsistent with your conclusion of insanity?

A Not inconsistent at all. In fact, it only reinforces my opinion. A person that does not know the difference between right and wrong in my opinion, would have difficulty feeling remorse about something that is not even considered wrong. Normally, a person experiences remorse and guilt, if they have some understanding that they have committed an act that is wrong, in their opinion.

Q All right. Another psychiatrist has testified then that Mr. Penry doesn't learn from his mistakes. Now, is that consistent or inconsistent with insanity?

A Very consistent.

Q All right. Does that mean that if Mr. Penry was spanked by his mother when he was five years old for hitting his brother or something like that, does that mean that he did not learn that [2402] he shouldn't hit his brother. Is that the type of thing you're talking about?

A That is a possible consequence, but that would be just one illustration. There can be many others that would be similar or compatible with that same description.

Q Now, in my example, I just said one spanking for one incident, but what about repeated spankings for repeated incidents, and he still didn't learn. Is that consistent or inconsistent with insanity?

A Consistent with my opinion.

Q All right. Are you familiar with a Dr. Felix Peebles?

A I am.

Q Presently you are the head of the psychiatric division at the Texas Department of Corrections, is that true?

A Well, the proper term is chief of mental health consultation services. That includes psychological and psychiatric services for the entire Texas Department of Corrections.

Q All right. And you are familiar with where Dr. Peebles is now stationed are you not?

A I am.

[2403] Q Is he under your department at this time?

A No, he is not.

Q Is he to your knowledge, presently practicing psychiatry?

A No, he is not.

Q All right. If he were practicing psychiatry, in the Department—the Texas Department of Corrections, would that be without your knowledge?

A Without my knowledge and approval.

Q Would it be without your consent?

A Yes.

Q All right. Dr. Peebles has testified that he's the only doctor out at the Ramsey Unit, and for that reason, then that's why he was doing general medicine and psychiatry, is that consistent with your understanding of the situation out at the Ramsey Unit?

A No, it is not.

Q What is the situation at the Ramsey Unit with regard to the Division of Psychiatric Services?

A We have a psychiatrist assigned to the Life consultation service for the unit with availability of contact through telephone, even after hours, so that there is always a [2404] psychiatric consultation service available at any time, so the use of the general physician of the particular unit, in this case, Ramsey I, would not be for psychiatric purposes, but for general medical services.

Q All right. Dr. Peebles has testified that he had an opportunity to work for you, but declined, is that true?

A Well, I would have to qualify my answer. He was offered a position in the comprehensive treatment center which is the psychiatric treatment facility in the Huntsville Unit. At the time that the position was offered, I did not have a house available for him. He elected to instead of practicing psychiatry to work for the general medical department, because they had a house available, and I did not have it at the time.

Q The last time you testified before this jury, I believe you were asked whether or not you had a copy of the statements signed by Mr. Penry, prior to the time that you did your examination. Do you recall that line of questioning?

A I recall.

Q Is it a fact or not that you had seen or read [2405] those statements before you did your examination?

A Well, you gave me some materials to look at, initially, when I first talked to you. When I answered that question, I did not have them in my file. And I had seen those reports initially, but I don't think I kept them. I don't have a copy in my file, as a matter of fact, I don't have my file with me today. But most of the material—all the material I have in my file has to do with medical records and medical information.

Q All right, then. Is it a fact or not that you took the purported statements of Mr. Penry into account in coming to the conclusions that you've earlier testified about?

A To some degree, yes.

Q Now, is it your opinion that Mr. Penry simply does not have the capacity to give the statements that we're speaking of—the two statements that he signed?

A Well, not precisely. My opinion is that the language used in the information I saw is not consistent with what I know his verbal ability to be. He may be

capable of relating information, but the language in the notes I saw is not [2406] consistent with what I happen to believe his verbal command is. I don't know if that makes it clearer or not.

Q Well, maybe I can make it more clear. If a tape recording had been made of him actually speaking at the time that he supposedly gave these statements, would you expect a great or a small variation between the statement and what you'd find on the recording?

A I would imagine that the language used on a verbal verbatim transcription of his communication would be different from what was in the report I saw.

Q Can you quantify? When you say it would be different, would it be greatly different or not so greatly different or is there any way to quantify it?

A It would just be a matter of the choice of words that would be the difference. The quality of the language would be more primitive, and that would be as far as I can go.

Q We'll pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Doctor, how primitive do you consider the [2407] word f-u-c-k? Would you consider that primitive or legalistic or advanced or just what?

A No, I think that is a word that is commonly used in the privacy of people's conversation. It's not usual in the strictest communication of the average person.

Q You wouldn't consider it a primitive word?

A Well, it is not a word for public use.

Q Okay. Doctor, you said that the prior testimony by other psychiatrists to the ability that the man had no remorse was consistent with your finding of insanity, is that correct?

A That's what I said.

Q It's also consistent with a diagnosis of anti-social personality too, isn't it, doctor?

A True.

Q And the fact that he doesn't learn from his mistakes is also consistent with a diagnosis of anti-social personality?

A True.

Q Doctor, on this 55/55 with an overall average of 51, do you just average the two, verbal and the other, together and come up with the overall average?

A No. My answer in answer to that particular [2408] question earlier, had to do that there is a system of tables sent out by the Wechsler Foundation and normally, the tables are standardized based on norms that the test has. I also said that that is usually pretty close to an average of the two figures.

Q Well, 55—51, that's pretty close to an average isn't it doctor?

A Well, four points is a substantial difference. It's not—

Q Okay. Let's look back at some of his other testing. Do you recognize this test I'm handing you now?

A Yes.

Q Okay. What are the two scores there, doctor?

A 72 and 47.

Q And how does that average out? Just the two together averaged.

A The average would be I believe, 59, 58.

Q 59½. What's his average there?

A 56.

Q Okay. So that's almost four points difference—three and a half points difference, isn't it? I didn't want this jury to be misled that, you know, they just averaged those two. They [2409] don't average those two scores just themselves, do they?

A That's what I said.

Q Right. And his verbal IQ, his ability to converse is much higher than his performance IQ, isn't it?

A True.

Q And it tests out that way all the way through, doesn't it?

A Often, yes.

Q He tests out not even being mentally retarded on strictly the verbal IQ, doesn't he, doctor?

A I don't think that's correct. I think that if it is seventy-three, that is still within the borderline, mild retarded range.

Q Did you talk to Mr. Wright over the weekend or something about coming back up here to testify again and straightening out some of your testimony?

A I don't think that was the way that it was described. I had talked to him earlier about the possibility of me needing to return after Dr. Peebles came.

Q Do you know Dr. Kenneth Vogtsberger?

A No, I have not met him.

[2410] Q And you did offer Dr. Peebles a place with you in psychiatry, didn't you?

A I did.

Q And how long ago was that?

A Frankly I do not recall the date. It was last year sometime.

Q Okay. Within the last twelve months, say?

A I did.

Q Okay. So evidently you feel like he was qualified or you wouldn't be hiring a man that was unqualified, would you?

A True.

Q No further questions.

BY THE COURT: Do you have any further questions, Mr. Wright?

BY MR. WRIGHT: Yes, I do.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Dr. Garcia, is it possible or not that a person who exhibits traits of the anti-social personality could also be insane?

A Yes.

Q So, there is not any reason why a person—I guess that answers the question then. With regard to this other test where the numerical average [2411] was 59½ and the actual score shown on the test was 56. Is there any significance to the fact that the spread was greater?

A Well, I don't have the tables with me, but the tables, like I said earlier, do not limit themselves to strictly the average. It usually is very close to the average, but I still am of the opinion that to find both the verbal and the performance the same almost doesn't happen.

Q Does your knowledge of the conclusions of Dr. Vogtsberger and Dr. Peebles alter your conclusion in any way that you earlier gave to this court?

A Well, I don't know whose opinion is whose. You cited several samples of other people's testimony. It was not identified as any particular person. If I am permitted to assume that you were extracting from testimony and those were instances of their opinion, their opinions did not significantly disagree with mine other than in the general outlook and result. The content is not incompatible with my opinion.

Q And now, your opinion as to whether or not he [2412] knows his conduct is wrong or that he is able to conform his actions to requirements of law is what, doctor?

A I also said earlier that I have not examined him since the initial date of examination, and I am of the opinion that at the time that he was not able to distinguish between right and wrong and that he could not conform to the requirements of law. I have no way of

knowing if there has been any change. I would suspect that there hasn't been any, but that's different from saying "I know there hasn't been."

Q Well, as of the date of the offense, your opinion was then and still is now that he is insane, is that true or not?

A That is true.

Q We'll pass the witness.

BY THE COURT: Do you have any other questions Mr. Price?

BY MR. PRICE: Just a couple.

RE-CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Doctor, you attribute it to brain damage, organic brain damage, is that right?

A I do.

[2413] Q Well, then you ought to be pretty sure of yourself in the fact that he hasn't changed any. His brain hasn't healed itself or anything.

A That's why—

Q There is no cure for organic brain damage, is there, doctor?

A That is correct.

Q Okay. So he should be just as insane today as he was when you saw him or at any other time in the last several years or whatever?

A Except for one difference. A person can recall information by rote, so that the information we know—

Q Doctor, what I'm asking you is is his brain improved?

A I don't know. I don't think so.

Q You don't know?

A I don't think so, but I have not examined him. since then, and the probability is—

Q Are you telling this jury that the brain will heal itself and he could recover from organic brain damage?

A No, I am not.

Q Okay. If he can't recover from it, then I assume that he is the same today as he was when [2414] you saw him, as he was on October 25, 1979, as he was ten years ago?

A That's the most probable answer, yes.

Q Okay. Would you consider him unsocialized, doctor?

A If you defined the term by what you mean in that respect, I'd be happy to answer it.

Q Well, how about you define it in the sense that you'd define it, of what it means to a psychiatrist.

A Well,—

Q You don't define it. I mean, your opinion as to what unsocialized means, would you say this man is unsocialized?

A Well, I cannot really answer it in absolute, because a person who lives in a black ghetto his concept of society is different from someone who lives in River Oaks in the Houston area and someone who lives in Harlem, for example, so if you could clarify the question I'd be happy to answer it.

Q Well, based on the definition that's put out in the Diagnostic and Statistical Manual mean anything to you?

A Yes, it does.

[2415] Q Okay. You have a definition of anti-social personality in that manual, don't you, doctor?

A Yes, there is.

Q And in that connection then, doctor, would you consider him basically unsocialized?

A Well, I think that if you take the definition of anti-social, it has to do with a person—

Q I'm not asking you if he's anti-social, I'm asking you if you think he's basically unsocialized?

A I don't really have an answer for that.

Q Okay. Would you say that his behavior pattern has brought him repeatedly into conflict with society?

A Well, it was reported that he has been charged with an offense in this particular situation and that he has had many problems before, so the answer to that question is yes.

Q Do you think it would be fair to say he is incapable of significant loyalty to individuals, groups, or social values?

A That I don't have an answer for.

Q You don't. You don't know whether he can be loyal to people or to social values or not and not understand that it's wrong to go out here [2416] and kill a human being?

A Well, I don't have an answer for that. I don't know.

Q Oh, I see. Would you consider him grossly selfish and irresponsible, and impulsive?

A Well, I mentioned earlier in my testimony that he was impulsive. I did not use the word selfish.

Q Would you consider him irresponsible?

A Well, he has no ability, so he can be irresponsible.

Q Unable to feel guilt or to learn from experience?

A Yes.

Q Likewise, unable to learn from punishment even?

A I guess that's true.

Q Frustration tolerance would be low?

A Very low.

Q Tend to blame others or offer plausible rationalization for his behavior?

A I didn't see any evidence of that.

Q Doctor, didn't you define an anti-social personality the other day in your definition when you were telling Mr. Wright all about anti-social personality, didn't you say that it required a high degree of intelligence, substantial [2417] sophistication?

A That's what I said, yes.

Q Would you look at this definition that came out of the Diagnostic and Statistical Manual?

A (Complying)

Q Is there anything in that definition about intelligence level or sophistication?

A No, sir.

Q Doctor, have you ever made a mistake?

A Sure.

Q You're capable of making a mistake?

A Indeed.

Q All right. Pass the witness.

BY THE COURT: Do you have any other questions, Mr. Wright?

BY MR. WRIGHT: Yes.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Doctor, is there a rule of ethics in your profession with regard to the prediction of future conditions—

(OBJECTION)

BY MR. PRICE: We object to this, Your Honor, as improper, [2418] immaterial and irrelevant to any issue before this jury at this time.

BY THE COURT: Sustain the objection.

(Mr. Wright Continuing) You testified earlier and you've just been cross examined about it again, about the anti-social personality and whether or not in your opinion—well, how intelligence, greater or lesser intelligence bears upon whether or not a person fits that category or not. Now, has anything that you've heard today or anything at all changed your opinion that you earlier stated to this court?

A No, it hasn't.

Q All right. In fact, isn't it possible again for a person—a person can be insane and exhibit the anti-social personality, isn't that true?

A Yes.

Q All right.

A Excuse me. Show anti-social behavior. Anti-social personality is a different situation all together.

Q All right. So they are totally unrelated?

A That's right. A person can have mental [2419] retardation, or organic brain disorder and behave in an anti-social manner. That doesn't mean that they have anti-social personality.

Q Okay. The existence of anti-social behavior then does not disprove organic brain damage, does it?

A No, it does not.

Q It does not disprove insanity, does it?

A No, it does not. To make it even clearer, this is an outdated piece of information. This is the Diagnostic and Statistical Manual. This is no longer current. In the current statistical manual, the presence of mental retardation excludes the possibility of anti-social personality. Just like it also excludes that the presence of mental retardation does not allow us to use the label of psychosis.

Q Were you just making reference to the page that was handed to you by Mr. Joe Price the District Attorney?

A Yes, I was.

Q And that's the page that's out of the manual that's outdated?

A Yes.

Q Obsolete?

[2420] A As of the first of January, 1980.

Q Pass the witness.

RE-CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Didn't you refer to the Manual as DSM #2, in your testimony the other day?

A I was making reference to the fact that—

Q Did you make reference to DSM #2—

BY MR. NEWMAN: If the Court please, let him finish his answer.

BY MR. PRICE: He's not answering my question.

BY THE COURT: All right. Mr. Newman, Mr.

Price, restrict your comments to the witness or to me. You'll answer the question. Restate the question, Mr. Price.

(Mr. Price Continuing) Did you or did you not in your testimony make reference to DSM # 2 in your testimony?

A I did.

Q And isn't that page out of DSM # 2?

A True.

Q Thank you. No further questions.

BY THE COURT: Do y'all have [2421] any other questions?

BY MR. WRIGHT: Yes.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Is there anything wrong with you making reference to DSM #2?

A No.

Q All right. Is there anything wrong with pointing out that this particular definition has been changed?

A Of course, that opinion is not really up to me. I was making the comment that DSM #3 is now in effect, which went into effect the first of January, 1980.

Q Pass the witness.

RE-CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Psychiatry doesn't use that definition of anti-social personality, any more?

A It's been changed, yes.

Q It has been changed?

A Yes.

Q And this is not even relevant?

A No, I didn't say that. It was relevant at the time this DSM # 2 was written and published, [2422] but the differentiation is substantial with today's new manual.

Q Right. But the other day you didn't even mention, DSM # 3 did you?

A I don't think so.

Q I don't think so either. Thank you, doctor.

* * *

[2538] FELIX PEEBLES, JR.

(Previously sworn and testified.)

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you state your name again for the jury?

A Dr. Felix Peebles, Jr.

Q And for the purposes of the record, doctor, you've already testified in this proceeding, have you not?

A Yes.

[2539] Q You are a psychiatrist?

A Yes, sir.

Q Doctor, I'll cut through some of the issues here. We'll be questioning you about some of the same matters that you've gone over in your testimony previously, but I direct your attention back to your examination of this defendant, Johnny Paul Penry. Particularly with regard to your examination of the defendant, did you in that examination have an opportunity to inquire of him as to the facts as he, at least, saw them surrounding this incident of October 25th, 1979, involving Pamela Carpenter?

A Yes.

Q And, doctor, did you have available to you or had you had available to you any statements purportedly given by this defendant up to that point in time?

A Yes.

Q And, doctor, did you relate any of the information in the statements to him, or did you—?

A No.

Q And in your inquiry of the defendant as to what took place, was he able to relate any [2540] type of story to you?

A Yes.

Q Was his story consistent or inconsistent with the statements that you had been given?

(OBJECTION)

BY MR. NEWMAN: We object to that. It calls for a conclusion.

BY THE COURT: Overrule the objection.

Q Was it consistent or inconsistent?

A It was essentially the same as the statement of facts from the record.

Q Did he relate to you, in fact, that he did go in the young woman's house, he did rape and kill her?

A Yes, sir.

Q Did he relate to you the means or what he used to kill her with?

A Yes, he said that he stabbed her in the chest with a large pair of scissors. And quite a bit of violence involved.

Q And did he relate to you any reason or did he give any reason for killing her?

A I asked him why he killed her and he said so she couldn't turn him in to the police.

Q During the time that he related the incidents [2541] of October 25th, 1979, particularly with regard to killing this young lady, did he ever exhibit any signs of remorse or regret of any nature whatsoever?

A No.

Q And you've already testified, I believe, that your diagnosis was that he has an anti-social personality. Is this consistent with that diagnosis?

A Yes.

Q Doctor, in your opinion is this man dangerous at this time?

A Yes.

Q With regard to the diagnosis of anti-social personality, is there any cure known to medical science?

A No.

Q Doctor, I believe you had previously had an occasion to examine him back in 1977, is that correct?

A Yes.

Q At that time, was that in connection with any criminal offense?

A Yes.

Q Do you know what offense that may have involved? [2542]

A Yes.

Q What type of offense was it?

(OBJECTION)

BY MR. WRIGHT: Judge, objection. May we approach the bench.

BY THE COURT: Yes, sir.

(Attorneys approach the bench)

BY MR. WRIGHT: We have a serious contention that if he is speaking of the prior conviction—it's invalid—if evidence—

BY THE COURT: What is your contention? Why do you think it's invalid?

BY MR. WRIGHT: Because it shows on its face that the evidence in the prior case is insufficient. All right. So, if they bring in this evidence now it will terribly prejudice our client if they want to bring it in first and get that resolved first, then that way we will have a chance to make our objection.

BY THE COURT: What are you contending? You said on its face it is invalid?

BY MR. WRIGHT: I can show you this is something we need to take up outside the jury's presence.

BY THE COURT: We'll recess the jury.

[2543] BY THE COURT: Ladies and gentlemen of the jury. At this time, you'll recess. You'll go back into the jury room. We'll call you when you're needed.

Again, you're admonished not to discuss the case among yourselves or with anyone else.

(OVT OF JURY'S HEARING)

(Defendant's Exhibit Number Ten Marked for Identification)

BY MR. NEWMAN: Do you want to offer it now for limited purposes to show its invalidity and for no other purpose?

BY MR. WRIGHT: Yes. I'm offering it now for the limited purpose of showing the invalidity of the prior conviction.

(Defendant's Exhibit Number Ten Offered in Evidence)

BY THE COURT: Is there any objection to it? For that purpose.

BY MR. PRICE: I don't know. [2544] Is that all of it?

BY MR. WRIGHT: Excuse me, I've left some things out. That thing needs to be added. These things were loose.

BY THE COURT: Y'all can look at it for about five minutes. Are you ready to proceed?

BY MR. WRIGHT: I'm ready to state my objection.

BY THE COURT: All right, sir.

BY MR. WRIGHT. My objection to the introduction of any evidence of prior conviction in Cause #9886 in the 9th District Court of Polk County, Texas, the State of Texas versus Johnny Paul Penry, is based on the following:

(1) the affidavit which is the only evidence in the case is insufficient to prove one of the elements of rape, which is what the conviction is for. The proof must be that he's compelled the victim to submit or participate [2545] by force that overcomes such earnest resistance as might reasonably be expected under the circumstances. There is no evidence that any force which was used was of that quality. That is, that it would overcome such earnest resistance as might reasonably be expected under the circumstances.

(2) There is a part of the affidavit, the stipulation of evidence, in which it is stated that he compelled submission by threatening imminent infliction of serious bodily injury or death. All right. There is no evidence that anything that he said compelled her to submit or participate by any threat that would prevent any resistance by a woman of ordinary resolution under the same or similar circumstances, because of a reasonable fear of harm as is [2546] required by the Texas Penal Code Section 21.02B2.

BY THE COURT: Is that all you have, Mr. Wright?

BY MR. WRIGHT: That's all I have, Your Honor.

BY THE COURT: Do y'all have any reply? Do you want to make—

BY MR. PRICE: Our only response, Your Honor, is that he's trying to colaterally attack this on the sufficiency of the evidence question. We don't even have the record from that proceeding. There might even have been testimony for that matter.

BY THE COURT: The Defendant's objection is overruled. Call the jury back in.

(JURY SEATED IN THE JURY BOX)

BY THE COURT: All right, Mr. Price. You can proceed.

BY MR. PRICE: Thank you, Your Honor.

[2547] (Mr. Price Continuing) Dr. Peebles, if I recall correctly, I believe my last question was to the effect that in 1977, when you examined this defendant, at that time, was that pursuant to some criminal charges that might have been pending against him?

A Yes.

Q More specifically, were you ordered by the Court or some Judge to examine the defendant for the normal findings of competency and sanity?

A Yes.

Q Do you know off hand what the offense involved—or what type of offense that was or offenses?

A Yes.

Q And what was it?

A A charge of rape.

Q And, I believe, it's already been introduced in evidence, but you did file a report with the Court, didn't you?

A Yes.

Q Your findings at that time were that the defendant was sane?

A Yes.

Q Dr. Peebles, your opinion's based on your [2548] prior dealings with this defendant as well as your experience and qualifications as a psychiatrist, do you have an opinion as to whether or not there is a probability that this defendant, Johnny Paul Penry, would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes.

Q What is your opinion?

A It's my opinion that he is dangerous and does constitute a threat to society and will continue to do so, whenever he's free in society.

Q Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Doctor, are you stating as a certainty that Mr. Penry will commit violence again or are you offering us that there is a certain statistical probability that he will?

A I'm not saying for certain that he will. I'm saying it's my opinion that he will on the basis of my knowledge.

Q Since, we're dealing with probabilities, there must also be a certain probability that he will not commit other acts of violence isn't [2549] that also true?

A There is also that possibility.

Q Now, doctor, have you made predictions such as this over the years?

A I have made predictions in the past.

Q All right. Now, after you've made a prediction, about future violence, have you systematically checked out to see which of your predictions proved correct and which didn't?

A No.

Q How do you know you're right?

A I don't have any statistics of all the predictions I've made and how many were correct and how many weren't.

Q Pass the witness.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Doctor, in 1977 did you make a prediction about this defendant, as to his dangerousness?

A Yes.

Q Did that one bear out from what you've been able to find out about this defendant?

A Yes.

Q In 1977 was your prediction at that time that he was dangerous and would continue to be [2550] dangerous in society?

A Yes.

(State's Exhibit Number Sixty Marked for Identification)

BY MR. PRICE: Your Honor, at this time, the State would offer into evidence State's Exhibit Number Sixty, at this time we will offer it into evidence.

(State's Exhibit Number Sixty Offered in Evidence)

BY MR. WRIGHT: Judge, we'll make the same objection that we heretofore made with regard to this.

BY MR. NEWMAN: That's defendant's exhibit what?

BY COURT REPORTER: Ten. S #60.

BY MR. WRIGHT: Your Honor, the same objections that we made with regard to Defendant's Exhibit Ten.

BY THE COURT: On the sufficiency of the proof that the—[2551] conviction. All right. On that basis, the Defendant's objection to State's Exhibit Sixty is overruled.

(State's Exhibit Number Sixty is Admitted in Evidence)

(Mr. Price Continuing) Dr. Peebles, I'm going to show you what's been marked as State's Exhibit Number Sixty and I'm going to raise the first page. Do you recognize the photograph of the individual portrayed there?

A Yes.

Q Can you identify him for the jury, please?

A Yes. Right here in the white shirt sitting at the table.

Q Do you know his name?

A Johnny Paul Penry.

Q All right, sir. Is that the same individual that you examined in 1977 that you've been testifying about?

A Yes.

Q Your Honor, may I exhibit this to the jury?

BY THE COURT: Approach the bench, just a minute.

(Attorneys approach the bench)

[2552] (OFF RECORD)

(Discussion out of Court Reporter's Hearing)

BY MR. PRICE: May I exhibit this to the jury?

BY THE COURT: Yes, sir.

BY MR. PRICE: Pass the witness.

BY THE COURT: Do you have any other questions of Dr. Peebles?

BY MR. NEWMAN: Just a moment.

RE-CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q You said you made a prediction concerning Mr. Penry's future behavior back in 1977, is that correct?

A Yes.

Q Was it contained in your report?

A Yes.

BY MR. NEWMAN: May I ask the witness one question, Your Honor?

BY THE COURT: Yes, sir.

QUESTIONS BY MR. NEWMAN:

Q Now, doctor, you do have a psychiatric section for treatment of people there in Huntsville, do [2553] you not?

A Yes, there's some segregation for the treatment of mental illness.

Q In that case that is now being passed before the jury there, the defendant was charged with aggravated rape, was he not?

A I think so.

Q Well, don't you know?

A Well, rape, I don't know about the aggravated specifically.

Q Well, now actually the aggravated rape was reduced to plain old rape and a five year plea bargain was given in that case, is that not true, or did you notice the packet that was handed to you?

A I didn't read the packet.

Q That the jury is now receiving.

A I just looked at the picture. I didn't read the packet.

Q Where there is a possibility to receive a life sentence for aggravated rape, don't you think that any defense lawyer that is worth his salt would be an idiot

not to bargain and accept a bargain for a punishment not to exceed five years?

(OBJECTION)

BY MR. PRICE: Your Honor, [2554] I'm going to object to this line of questioning.

BY THE COURT: Mr. Newman, just a minute.

BY MR. NEWMAN: I had to finish my question, Judge.

BY MR. PRICE: I'm objecting to that line of questioning being irrelevant and immaterial and calling for a conclusion from a doctor—I don't know what's it's based on, but it certainly wouldn't be within the psychiatric field, I don't think. Maybe he could call some lawyers in here to testify.

BY THE COURT: Sustain the objection.

BY MR. NEWMAN: If the Court please, we want to show that that record will affirmatively reflect that. It's now being handed to the jury.

BY THE COURT: I don't see how it can reflect—All right. Mr. [2555] Newman, just a moment. Do you know the answer to the question, Dr. Peebles, without answering the question that he asked? Do you feel that you could give an answer to the question, without answering the question that he asked you?

BY MR. PEEBLES: No, sir. I've not been involved in plea bargaining or that sort of thing.

BY THE COURT: All right. The objection is sustained.

BY MR. NEWMAN: All right. No further questions.

RE-DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Doctor, I'll show you what's been previously marked as State's Exhibit Fifty-Nine, among others. I direct your attention to the lower part of that opin-

ion. Is that a copy of the opinion that you rendered in 1977?

A Yes, this is a copy of my report of May 19, 1977.

Q And, doctor, on May 19, 1977, when you gave that report and I'll direct your attention to [2556] the last paragraph upon that page, is it not correct that you stated: "It is my further professional opinion that if Johnny Paul Penry were released from custody that he would be dangerous to other persons."?

A That's correct.

Q Do you still stand by that opinion, doctor?

A Yes.

Q And it's been proven to be correct since then, hasn't it, doctor?

A Yes.

Q Pass the witness.

BY THE COURT: Do y'all have any other questions?

BY MR. NEWMAN: Just a second, Judge.

RE-CROSS EXAMINATION

QUESTIONS BY MR. NEWMAN:

Q Doctor, what organization were you with on May 19, 1977, when this examination took place?

A Deep East Texas Regional Mental Health and Mental Retardation Services.

Q Well, you had made an examination of this boy while you were in the Rusk State Hospital had you not, in 1974, 73 or 74?

[2557] A 1973.

Q 1973. Well, was your opinion the same then as it was at this date?

A No, we were not dealing with dangerousness at that time. He was on a civil commitment to the hospital, and the dangerousness was not an issue at that time.

Q Well, that was under a—he was under a criminal charge at that time, was he not?

A Not to my knowledge. Not to my knowledge or recollection, was there any criminal involvement at the time he was in Rusk.

Q Doctor, if it was your opinion in May, 1977 that he would be dangerous if he was released, why was he not committed to an insane asylum and kept there?

A It was my opinion that he was not insane and that he did not need psychiatric or mental treatment in 1977.

Q In spite of your prediction, the boy was given a sentence, where he could get out in two years or less, was he not?

A Apparently so.

Q That's all.

BY MR. PRICE: No further [2558] questions.

BY THE COURT: Okay. Dr. Peebles, you can step down. Do either of you have any objection to excusing Dr. Peebles or do you want him to remain on call.

BY MR. PRICE: I have no objection.

BY MR. NEWMAN: No objection.

BY THE COURT: All right. Thank you, Dr. Peebles.

BY DR. PEEBLES: Thank you.

BY THE COURT: Mr. Price, who is your next witness?

BY MR. PRICE: I'm not sure, Judge.

BY THE COURT: Mr. Cook is out there, if you're ready for him. Ladies and gentlemen of the jury, again, you're admonished not to discuss the case among yourselves or with anyone else. If anyone attempts to discuss it with you, you're to report it to me.

(Court took a brief recess)

[2559] KENNETH VOGTSBERGER

(Previously sworn and testified)

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you state your full name for the jury, please?

A Yes, sir. Kenneth N. Vogtsberger.

Q Dr. Vogtsberger, you've previously testified in this trial, have you not?

A Yes, sir.

Q You are a psychiatrist, employed presently by Deep East Texas Regional Mental Health and Mental Retardation Services?

A Yes, sir.

Q I believe you examined the defendant pursuant to a court order back in November of 1979, is that correct? [2560] A Yes, sir.

Q And, Dr. Vogtsberger, back on that date, when you had an occasion to examine the defendant, did you have available to you copies of two purported statements that this defendant had given law enforcement personnel?

A Yes, sir.

Q And, did you during your examination request the defendant to relate his version of how the crime or alleged crime took place?

A Yes, sir.

Q Doctor, would the facts that he related to you, would they be consistent or inconsistent with those statements?

(OBJECTION)

BY MR. NEWMAN: Object to that, Your Honor. It calls for a conclusion.

BY THE COURT: Overrule the objection.

(Dr. Vogtsberger Answering) Yes, sir. They seemed to parallel the written statements.

Q Dr. Vogtsberger, while he was relating to you the manner and means in which he committed this offense, did he show any remorse or regret of any nature?

[2561] A No, sir.

Q And I believe you diagnosed him as being an anti-social personality, is that basically correct?

A Well, I did not put an actual diagnosis in my written report.

Q Well, is that your diagnosis?

A Yes, sir. That seems to be the type of personality he exhibits.

Q Would that be consistent with the failure to show remorse or regret?

A Yes, sir.

Q Dr. Vogtsberger, specifically, do you have an opinion as to whether or not, based upon your examination of this defendant as well as all of the other records and matters that you've had an occasion to examine, as to whether or not there is a probability that this defendant, Johnny Paul Penry, would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes, sir. I would feel that there would be high probability for that to happen with him.

Q More specifically, doctor, would you consider this man dangerous, if he were released into [2562] society?

A Yes, sir.

Q Pass the witness.

BY THE COURT: All right, Mr. Wright.

CROSS EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Doctor, you're not stating as a certainty that Mr. Penry will commit violence again, are you?

A No, sir.

Q Okay. So, then there is a certain probability that he will not be violent again, isn't there?

A Yes, sir. There is a chance.

Q All right. Now, doctor, have you made predictions of this sort in the past?

A Specifically—could you clarify your—

Q Predictions as to the propensity of a person to commit acts of violence in the future. Have you made predictions in that regard in the past?

A I've made clinical decisions, yes, sir, in my day to day practice as a psychiatrist. I've not been asked to give an opinion in a court of law like this before.

Q All right. How many years have you been doing that?

[2563] A I've been in the practice of psychiatry about four years and eight months.

Q And making that kind of predictions all that time?

A Yes, sir.

Q All right. Have you systematically checked out to see which of your predictions were correct and which were not?

A No, sir. I do not have any hard and fast data on that.

Q How do you know you're right?

A From follow up on people that I have treated.

Q I thought you told me that you hadn't done that?

A Well, I don't have any hard and fast data, in other words, a percentile that I could quote you.

Q But you don't have any evidence as to the proportion of the time you're correct and the proportion of the time that you're not?

A No, sir. As I said, no written evidence on that.

Q Do you think that Mr. Penry was mentally capable of showing any remorse at the time that you examined him?

A Yes, sir. I think he was capable of that.

Q Pass the witness.

. . . .

[2658] BY MR. PRICE: Yes, sir. We've had a chance to examine it, and the only point that we would like to make to the Court is on that particular part about leaving an issue blank. We would request a little more clarified or more clarification in that respect. That is the only request or objection we have to the Charge.

BY THE COURT: All right. Your objection is overruled. I'll ask the Defense has the Defense had the opportunity to examine the Charge and are you ready to make any objections you might have to the Charge.

BY MR. WRIGHT: We have had an opportunity to examine the Charge and are prepared to make objections to it.

BY THE COURT: All right, sir. I'll hear your objections.

BY MR. WRIGHT: Now comes, [2659] Johnny Paul Penry, Defendant in the above entitled and numbered cause, and after the State and the Defendant have rested and closed, and before the Charge of the Court is read to the jury and pursuant to agreement with the attorneys for the State and with the consent of the Court and in the Court's presence presents these, his objections to the Charge of the Court herein by dictating the same into the record to the court reported for subsequent transcription and endorsement by the Court with its ruling and official signature and filing with the Clerk of the Court.

OBJECTION 1: Our first objection to the Court's Charge is that there is insufficient evidence to support Special Issues 1, 2, and 3, contained therein.

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term [2660] deliberately.

OBJECTION 3: The defendant objects and excepts to the Court's Charge on the grounds that it fails to define the term probability.

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not

define the terms that defendant would commit "criminal acts of violence."

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.

OBJECTION 6: The next objection to the Charge, Number 6, I believe, is that it fails to Charge on the law of circumstantial evidence.

OBJECTION 7: The next exception and objection to the Charge is that it fails to instruct the jury on the law regarding the voluntariness of the purported confessions which have been admitted into evidence [2661] in this cause.

OBJECTION 8: The next objection of the Defendant is that the Defendant objects to the submission of the verdict form permitting the jury to assess the death penalty because under the evidence produced in this cause said punishment would be cruel and unusual punishment prohibited by the eighth amendment to the United States Constitution and by Article One, Section Thirteen of the Texas Constitution, because among other reasons it is excessive in that the punishment involves the unnecessary and wanton infliction of pain and is grossly out of proportion to the severity of the crime, especially in view of the mental illness and condition of the defendant.

OBJECTION 9: The next exception and objection to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State show beyond a [2662] reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances which exist in this cause.

OBJECTION 10: The next objection is the Defendant further objects to the Court's Charge because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances.

OBJECTION 11: The next objection to the Court's Charge is that it fails to instruct the jury that it may take into consideration all of the evidence whether aggravating or mitigating in nature if any, which has been submitted in the full trial of the case.

May I see the Court's Charge. I may have prepared something in error here. I want to restate this Number 10 again, as I don't know where I just left off. [2663] The Defendant's objection Number 10 is that the Court's Charge fails to instruct the jury to the following effect: "you may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

OBJECTION 12: The Defendant's eleventh objection to the Charge is that the Court's Charge fails to require as a condition to the assessment of the death penalty that the State prove [2664] beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing deadly threat to society.

OBJECTION 13: The twelfth objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated. Respectfully Submitted John Wright and Joe Newman. And there will be a place there for us to sign in the Court's Certificate.

(See Volume One for Signatures)

BY THE COURT: All right. The Defendant's objections to the Charge are overruled and denied. All of the thirteen objections. Is that right?

BY MR. WRIGHT: I believe that [2665] is correct.

* * *

[2666]

STATE'S OPENING ARGUMENT BY MR. KEESHAN:

May it please the Court, counsel, ladies and gentlemen of the jury, this is the last opportunity we'll have to address you in this case before you retire and you're released as jurors to go about your lives. I want to tell you that we have appreciated—and that is—all of us have appreciated you taking the time away from your families and your jobs to come down here and do your civic duty. I want to commend you furthermore for the verdict that you returned into this Court yesterday. It was a just and righteous and proper verdict, and we [2667] could tell—myself and Mr. Price—from the promptness of the verdict that you were not led down any of the rabbit trails that might have been offered to you in this case. You notice also that the evidence that was presented to you in this part of the case was, of course, much more brief than that in the guilt phase. Now, I'm sure you're thankful for that, but I don't want you to be misled into thinking that this phase of the case is not as important as the guilt phase. The punishment phase of this case is important because if you came up with a punishment that was not just or the punishment did not fit the crime, then justice would not have prevailed. So, I'd encourage you to hang in there and be just as serious in your considerations about this part of the case as you were about the first part. I'm going to turn now pretty quickly to the three special issues you're concerned about in this case. And beginning with the one about whether or not the conduct was deliberate,

was committed deliberately, that caused the death and with the reasonable expectation that the death of the deceased, Pamela Carpenter, or another [2668] would occur. Well, of course, the only answer to that is "yes." There is no doubt whatever that the defendant's conduct was deliberate. You know that from the evidence that you heard about the body of Pamela Carpenter. You know that she had been beaten and choked and kicked and stomped into submission, that she had to be substantially helpless by the time that she was stabbed. We know from the confession of the defendant that it was intentionally done, and that it was done for the purpose of keeping her from reporting him to the police. There is no question about the fact that it was deliberate. The second issue is, is there a probability that this defendant will commit criminal acts of violence that will constitute a continuing threat to society. And, of course, we know from many things we've had in this case that there's more than a probability. There is a very strong probability, a very strong probability, based on the history of this defendant, his previous criminal record, and the psychiatric testimony that we've had in this case, that the defendant will continue to commit acts of this nature. One thing that [2669] you may hear from the defense attorney is that the fact that "well, if you send this man to prison, he won't be able to hurt anybody there." That issue, that second issue, is not limited to prison. It asks you if there is a probability without regard to whether he's in prison or out of prison, as to whether he would commit criminal acts of violence that would constitute a danger to society. The answer to that is clearly yes. Furthermore, even if it were limited to the consideration of prison, there are people in prison that can be hurt. There're not only prisoners there. There are doctors, as we know from the testimony we've had here. There are nurses there. There are librarians. There are teachers. There are other people in prison that can be harmed by prisoners. Then, as to the third ques-

tion, was the conduct unreasonable in response to the provocation, if any, on the part of the dead person. Pamela Carpenter, which led to the death? Was the conduct unreasonable in response to the provocation, if any—well, of course the conduct that caused her death was not in response to provocation. It was not in response [2670] to the superficial wounds on the defendant's back. We know that that happened earlier, that after that happened and at the time that was happening that this victim was pounded to the ground and overpowered and was substantially helpless and that after he had gratified himself, that the defendant walked over and picked up the scissors and sat down on Pamela and plunged the scissors in. We know that it was not in response to provocation. It was for the purpose of avoiding detection. So, the answer to that special issue should be yes also. And there's been some talk about the 1977 rape conviction. You didn't learn until this part of the trial that this defendant had previously been sentenced to the penitentiary, had been found guilty, and sentenced to the penitentiary for another rape that happened over in Polk County in 1977. Joe Newman, I think, made an issue of the fact that the punishment appeared to be very lenient, and I don't know whether he was implying by that and by going through the personalities involved that Judge Ernest Coker had done something wrong, and we should consider that he's the cause of us being here [2671] today or whether he's trying to say that Assistant District Attorney Jerry Winfree had done something wrong and should be criticized or Clayton Malone. None of those people are on trial in this case. That's not the issue that we have here. We're concerned with the punishment for this defendant. I'd like to point out to you also that since that's the only conviction that was offered and admitted in evidence, you can take it from that that that was the first conviction of this defendant. And I think that it's a matter of common knowledge that people who are first offenders, as far as

convictions are concerned, are often treated more leniently by the Courts, that is the judges, the prosecutors, and the jury, than people who have a previous criminal record. But nevertheless, if we were able, if any of us were able at this time to go back to 1977 and have the power to go into that Court and change that sentence, I feel sure that any of us who could do so, would change that sentence to be 1000 years. Because maybe by doing so, we could have avoided the death of Pamela Carpenter. Of course, we can't do that. We [2672] can't turn back the clock. And I'm not a student of philosophy, but there's a statement by an American philosopher that has a bearing on that issue. His name is George Santiana, and he once said that "he who does not learn the lessons of history is condemned to relive it." We cannot relive this sad history that we've learned about in this case, and nobody should again have to be confronted with what Pamela Carpenter went through. I'm asking you to make your verdict stand for something in this case. The verdict should be yes clearly answered to each question. But I want your verdict to be a monument to your community, to your local criminal justice system, something you can be proud of, and something your community can be proud of. I would like your verdict to stand for the proposition that the people of Trinity County will not tolerate this sort of conduct. They won't tolerate it whether it occurs in Trinity County, or Polk County, or any other county in the State of Texas and I'd like you also to understand that what you do here can influence other people who might commit crimes of this nature. And when [2673] you leave here today, if you find the answer to each one of these questions to be yes, when you go home tonight and you see your children if you have any, or your loved ones, put your arm around them and tell them you've done something for them today—something to make a better community for them. I thank you for your time.

BY THE COURT: All right, Mr. Wright.

DEFENDANT'S OPENING ARGUMENT BY MR. WRIGHT:

May it please the Court, counsel, ladies and gentlemen on the jury, the first thing that comes to my mind when I hear this talk about the death penalty, and that is what we're speaking about here, that is what we're speaking about. Mr. Keeshan mentioned three special issues, but you know the effect of an affirmative answer to those three issues. The first thing that comes to my mind when we're talking about the death penalty is the unfair and unequal application of it. I'll ask each of you to think, if you can think of any trial that you ever heard about where a wealthy person, a rich person, received the death penalty. [2674] I can't think of a single one. You've noticed in our case that our client is not, for example, T. Cullen Davis. I guess in fairness, you've also noticed that I'm not Racehorse Haynes. The fact is that few, if any, rich men have ever received the death penalty. Now, I'm very concerned about this case. I think that I have the strength to overcome many things, but I'm concerned, because if I thought that I were to become an instrument in this boy's destruction I don't think I could ever, ever forget it. Now, I am concerned about that, but there are a few things that I'm not concerned about. I'm not concerned that this jury wants to do anything other than what is just and right. I'm not concerned that you'll become a mob, or even a team. I know that each of you have the right not to agree with the others. I am very concerned with my own inadequacy in handling this case. If I have made or do make a mistake to the detriment to cause the destruction of Johnny Paul Penry, I'll be forever heartstricken. In this connection, I'll say that if I have offended any of you, please blame me and not [2675] Johnny Paul Penry. Another concern that I have is our mutual heritage of savagery. Before the time of Jesus Christ, we had the old law that said an eye for an eye and a tooth for a

tooth. The State may, maybe they will quote from this Old Testament, but they cannot quote that from the lips of Jesus Christ. I think that the issue is clear. Our side of this case, the defense, will appeal to your intellect, your call to judgment, and to your sense of Christian love. The State will attempt to strip from you the thin veneer of civilization and return you to savagery. Now, before we consider this any further, in order to put this into perspective, let's bear in mind that there is not anything unusual about the State asking for the death penalty. You can hear the same stock arguments here and in all the court houses across the country. I think of it as a type of Russian roulette. They ask for it every time they can possibly get it, and then they hope that lightening will strike in some small percentage of cases. It may be that the State will attempt to appeal to your sense of pride. They may assert that there is something [2676] courageous in demanding that this young man be strapped in a chair and be given a lethal injection. I suggest to you that this is the same courage as has a spectator at a bull fight high in the grandstands, far from any danger. The State may appeal to you on your passion and prejudice. They must. What they seek will not stand calm, mature consideration. They must use emotion to strip away our thin veneer of civilization and religion. This may be done by commenting on the victim's undeniable right to life and her will to maintain her life. No one is more respectful of the right to life than Mr. Newman and myself. No one is asking you to approve in any way for what has happened. Two wrongs do not a right make. The law allows you the God-like power to take life, but you cannot by killing Johnny Paul Penry bring back Pamela Carpenter. Yet, these men in the execution of their sworn duty, ask you to authorize yet another killing. They will characterize Johnny Paul Penry in such a way as to put hate and fear in your hearts. I'll ask you this now, do your best decisions arise from feelings of hate and fear [2677] or

don't you regret them later? They may appeal to your sense of duty, as if it were your duty—you'd be not doing your duty, they may suggest not to give the death penalty. But your duty as you were instructed by the Court early on, is to consider the full range of punishment and not just to give the maximum. Our appeal again is to your intellect and to your sense of Christian love. Johnny Paul Penry is not beyond the love of God, nor is he beyond your Christian love. The State may use the argument of deterrence. They may say "well, it won't deter others maybe, but it will sure deter Johnny Paul Penry." Well, this is just a way then to do away with those that we don't like, those that we consider to be undesirable. But our country is known the world over as the place that will accept refugees thought undesirable elsewhere. Many of these refugees later make major contributions of every kind. So, who has the right to judge? Will you and I be the undesirables in the next situations that we find ourselves in. Another argument about deterrence is this. If it is to be a deterrent, why do we not publicize it rather than hide it. [2678] Wouldn't you think that criminals should be given a reserved seat at the execution, so that they could be deterred? Shouldn't it be televised? Shouldn't movies be made of it so our children will be able to observe the unhappy fate of wrongdoers? No, that is against the laws of the State. I'll read to you now from Article 43.20 of the Texas Code of Criminal Procedure, which says, speaking of an execution of a person convicted of a crime. "The following persons may be present at the execution: the executioner and such persons as may be necessary to assist him in conducting the execution, the board of directors of the Department of Corrections, two physicians, including the prison physician, the spiritual adviser of the condemned, the chaplains of the Department of Corrections, the County Judge and Sheriff of the County in which the Department of Corrections is situated, and any of the relatives or friends of the con-

demned person that he may request, not exceeding five in number shall be admitted." None of those people look like folks that particularly are going to need to be deterred, but the last [2679] sentence "No convict shall be permitted by the prison authorities to witness the execution." As far as I've been able to tell, the following faiths publicly and officially disapprove the death penalty: Baptists, Methodists, Episcopalians, Disciples of Christ, Presbyterian. I'll read now from the Baptist law adopted at the Baptist convention in Cincinnati, Ohio. (1) Because human agencies and their legal justice are fallible and innocent men have been put to death, and (2) because the Christian believes in the inherently sacred quality of all life as the gift of God, and (3) because the deterrent effects of capital punishment are not fully supported by the available evidence, and (4) because the emphasis in modern penology is upon the process of creative, redemptive rehabilitation, rather than primitive retribution, we therefore recommend the abolition of capital punishment in those states which still practice it. They say that Johnny Paul Penry killed in cold blood, but he did not lock anyone in a room, keep him there for weeks or months, maybe years, and then announce ahead of time the date in time of his death and [2680] let him die a thousand deaths in the interim. The State asks that you, each of you, condemn him to death. I think that it probably goes without saying that a more intelligent criminal is one who is more likely to evade capture and evade prosecution, and even evade the death penalty. But isn't a person of greater intelligence more culpable and not less. Now, is that fair or is that right? Mr. Keeshan spoke with you about deliberateness in the first special issue. He seemed to equate it with intentional, and you've already decided about intentional. That word then must mean more than merely intentional. Y'all are all familiar, for example, with the Elmer Wayne Hendley case down in Houston, a mass murder case that took place over a long period of

time. Deliberate. You're also familiar say with the Ignacio Cuevas case that took place down in Huntsville, or the facts did. Where a group of convicts got together and planned a breakout and killed some folks breaking out. Deliberateness. We've heard about the news of this Gacy case up in Chicago or near Chicago, where he [2681] supposedly killed all these young boys over a long period of time. That's deliberateness. That's the kind of case where possibly the death penalty was intended by our State laws. I think also there's been a lot of evidence here about Johnny Paul Penry's mental condition and mental state. Certainly you have to believe that his mental state was not healthy. He's mentally ill. Certainly you know that his environment played a part in this. Think about each of those special issues and see if you don't find that we're inquiring into the mental state of the defendant in each and every one of them. It takes all twelve of you to send this boy to the death chamber. None of you can later say the others did it. The love and equitable precepts of Jesus Christ are the cornerstone of free society everywhere. What would he do if he sat in your chair today? Thank you.

BY THE COURT: Ladies and gentlemen of the jury, at this time we'll recess for about five minutes. You can go into that room, if you'd like to go to the [2682] restroom or get a drink of water. But you won't leave that room. Again, you're admonished not to discuss the case among yourselves or with anyone else.

(Court recessed for five minutes)

(Court re-convened with Jury Seated in Jury Box)

BY THE COURT: At this time we'll proceed with the Defendant's Closing Argument. Mr. Newman.

DEFENDANT'S CLOSING ARGUMENT BY
MR. NEWMAN:

May it please the Court, ladies and gentlemen, of the jury, Mr. Keeshan and Mr. Price, ladies and gentlemen of the jury, you have disagreed with us as to what your verdict should be. But as I told you yesterday, you will not hear any criticism whatsoever on our part as to your decision. You are honest, honorable people. You are reasonable people, and that decision is with you and your conscience. Now, we are called upon and you are called upon to assess punishment in this case. You know what the effect of the three issues will be in the event you answer yes. You know that that will [2683] be the death penalty. You know that if you answer any one of these issues no then it is mandatory life. I was somewhat amazed that Mr. Keeshan, when he told you that you ought to return a verdict that you could go home and be proud of. Is there any pride to taking the life of any person, much less a person which the evidence has shown here was an afflicted child at the age of nine. The records reflect that this boy had an afflicted mind at the age of nine and we can't get around that. The records reflect that later on when he went to school up there for three years and he was taken out by his parents who apparently—or something must be wrong with them to have taken him away from a place that there might have been some control, some possibility at least, where he could be cared for instead of bringing him back into the environment where his mental condition would be worsened by the treatment that he no doubt received. And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they [2684] ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience. We live in a Christian country. We live in a country that believes that it is better to forgive than

to hold your grudges against people. There is no question on earth that we live in a civilized society. We must have our rules and our regulations. We must have that in order to protect the people, who have the right to worship in the way that they want to worship, who have the right to pursue their happiness, who have the right to acquire property. We must have our rules and regulations and the jurors for this community and this State must enforce them, but the Court—the law does give you the right to take lives, but there is no law on earth if that life has been taken can restore that life. I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer. You heard the evidence on the original guilt or innocence, [2685] and here they brought to you this packet from the prison. They brought you this record from the Polk County Court House. Here, this defendant was charged with aggravated rape, and instead of convicting him of aggravated rape, and even then, there must have been some doubt as to the mentality of this boy at that time. Why? They had one of their main witnesses here, Dr. Peebles, who's like a rubber stamp, who probably could not make a living out in the private practice of medicine, come in and say, he is of sound mind. I would be willing to bet that unless, he is a gibbering idiot that he's like some of those psychiatrists who they have in Harris County who come in to look at them and then get on the witness stand and say that this man is of sound mind. But now, he comes in here and he predicts that this boy in all reasonable probability will continue to get into trouble. That may be true. But, a boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of you juror's [2686] minds that there is something definitely wrong, basically, with this boy. And I think there is not a single one of you that doesn't

believe that this boy had brain damage as they found it at the University of Texas, when they ran those tests and formed those conclusions. Ladies and gentlemen of the jury, if you go out and give this boy the death penalty—One of the objects of punishment is to deter others from committing similar offenses. That is supposed to be it, but what do we have? Mr. Wright told you who they permit to see the death. That's the most amazing thing to me and should be to you, and that is probably the reason that four hundred years ago that Shakespeare said, "the law is an ass." And here "No convict shall be permitted by the prison authority to witness the execution." Now isn't that the most stupid thing that you ever heard. If anything, we ought to have or require them to have a closed television and every person in the penitentiary as a convict ought to be required to see any execution that they might have. It might have some effect on them. But here, they are prevented from doing so. [2687] That doesn't make sense to me. I don't know whether it makes sense to you. I know that most of you, if not all of you, are good Christian people. Mr. Wright read to you about the people of the Methodist faith. In their church laws they have condemned the death penalty. The people of the Baptist faith in the Cleveland convention in 1964 and up until the present time have condemned the death penalty. The Presbyterian church and others have condemned the death sentence in part as against their religion. Of course, you might say that that is the law of God and render unto God what is God's and render unto Caesar what is Caesar's, and that is Caesar's business that you are about. But ladies and gentlemen, you also have your conscience and your faith as Christians to still remember that you should not take that which cannot be restored. And I say to you, you have heard the evidence. You are honorable people, and I think that Mr. Keeshan was in error when he told you, "I want you to render a verdict that you can be proud of." Can anybody be

proud of taking the life or being responsible for taking the life of [2688] another. I don't think so. There is—don't get me wrong, ladies and gentlemen, I'm not standing up here to condone this terrible thing that has occurred to this fine Moseley family. There's nothing to condone, but will the death penalty cure the wrong that has been done? Are you, as jurors, going to commit another wrong to try to right that wrong? That is an impossibility by going out and finding for the death penalty in this case, and I tell you, ladies and gentlemen of the jury, I don't think it would be a proper verdict in this case, but that is with your conscience. Thank you.

BY THE COURT: All right, Mr. Price, are you ready to make the State's closing argument?

STATE'S CLOSING ARGUMENT BY MR. PRICE:

May it please the Court, Mr. Newman, Mr. Wright, Jim, ladies and gentlemen of the jury, one thought occurred to me while I sat there and listened to Mr. Wright and Mr. Newman. I did not recall any of them discussing any fact issues, any evidence, and that's what you are about to do, go out and follow the instructions [2689] that the Court has given you. You all told us under oath on voir dire what your feelings were on the death penalty. I'm not going to argue the issue of whether the death penalty is right or wrong. We're already discussed that individually, each one of us. You've all taken an oath to follow the law and you know what the law is. I'm not going to discuss that with you. You've all said you want to follow the law, and I trust that you will, and I know that you will. I didn't hear Mr. Newman or Mr. Wright say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is to go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met

that burden, and that's the reason that you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case, because, ladies and gentlemen, I submit to you [2690] we've met our burden. So, what we have here is about forty-five minutes of emotional argument, and that's what exactly it all boils down to, pleading to your emotions. And obviously, this is the type of subject that can be used to easily move you emotionally. It would move anyone, and I think there would be something wrong with you, if you weren't at least concerned. But, ladies and gentlemen, your job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly. A few comments—Mr. Wright is worried about him being the instrument of this boy's destruction. I submit to you that Mr. Wright has nothing to do with Johnny Paul Penry's destruction. If anybody has anything to do with Johnny Paul Penry's destruction or future or otherwise, it is Johnny Paul Penry. Mr. Wright wasn't there and didn't hold his hand on these scissors. Johnny Paul Penry did that. Nobody helped him. It was Johnny Paul Penry, and he's the one that's on trial and he's the one that should be on [2691] trial for this issue. Mr. Wright says the State will come in here and try to strip civilization away from you and return you to savagery. I ask you this question only. Who acted like a savage? And I think your answer will be sitting right over across that table down there. He says Mr. Penry didn't lock anybody in a room. Oh, he sure didn't, but he did much more than that, ladies and gentlemen. I imagine Pamela Carpenter would have loved to have been locked in a room. What Mr. Penry did, he did deprive her of every rule of evidence, every law and every constitutional right that has been afforded this man. He denied Pamela Carpenter those rights.

And he became her self-appointed executioner, and he didn't strap her in a chair and inject her with some kind of deadly solution. He rammed her own scissors in her chest. That was Johnny Paul Penry's doing. Mr. Newman says the law is an ass. It wasn't an ass, when he was using it and when it was working for the benefit of his client, but now at the last moment, the law is an ass. And I say to you that it's a little late. Mr. Penry has had his rights protected [2692] right down the line, ladies and gentlemen, as you are all very well aware. And the Judge has been here to make sure that he's protected. He's had two fine lawyers appointed to represent him and see that his rights have all been protected, but I'll point out to you at this stage of the trial, somebody else is concerned and involved and that is society. Society deserves a little bit of protection also. And the other Pamela Carpenters in this world deserve protection also, ladies and gentlemen. And at this point in time, I think we might ought to consider society's rights and society's interests in this matter. You know, you hear all the time about why don't they do something, why don't they do something. Well, who is they? It's not the police. They go out and investigate criminal cases and make arrests and bring them into Court. And it's not the prosecutors, the District Attorneys. They present the cases. Ladies and gentlemen, I submit to you that the "they" is you. And now it is in your power to do something, ladies and gentlemen. His whole argument has been based on emotion and sympathy. I'm not going [2693] to argue the Bible with you, but there is a beautiful story of compassion in the Bible. It was about a man finding another man that had been beaten and robbed on the side of a road, and he takes him home and bathes his wounds and nurses him back to health. That is a beautiful story of compassion and brotherly love, but I point out to you, ladies and gentlemen, that the compassion shown in that story was for the victim of the crime, and not for the person that perpetrated that

crime. So, I ask you not to misplace your sympathy or your compassion. There is plenty of room for sympathy and compassion. There is a mother and father that lost their only daughter. There is a young man that lost his wife, and will go through the rest of his life with a scar that nobody can remove and nobody can change. There's plenty of room for compassion, but Johnny Paul Penry does not deserve your sympathy, ladies and gentlemen. He does not deserve it. And I ask you, when you get emotional or sympathetic, then I ask you to do this, and try, and I don't think you will be able to, I can't myself. Try to conceive, if you think about [2694] this defendant as Mr. Wright and Mr. Newman have just got through talking to you, but you try to think about how he looked at 9:30 A.M. on October 25th, 1979. You try to visualize in your mind how he looked to Pamela Carpenter when he was standing over her, kicking her and stomping her. You try to visualize him in your mind, when she looked into his eyes, what she saw. And you think about Pamela Carpenter. You think about her lying there on the floor, having been beaten nearly to death, stomped and kicked and raped and probably thinking, "My God, what else?" And then looks and he walks over and sits down on her with these scissors. And you think about what she was thinking about at that moment. If there is any sympathy to be put around in ~~this~~ case, ladies and gentlemen, think about that. And ~~then~~ think about probably the animalistic look in this man's eyes, when he buried those scissors in her chest. That happened, ladies and gentlemen, and I don't want you to forget it. I don't want you to go in that jury room and get off on some tangent. I want you to look at the facts in this case. Look at what this man said [2695] about how he committed this crime. Look at the evidence in this case and look at these ugly photographs, because they are real, ladies and gentlemen. They show you what Johnny Paul Penry is really like. And they show you the man that Mr. Newman and Mr. Wright just got

through asking you for compassion and sympathy for. I told you yesterday that Pam Carpenter started a fight, a struggle back on October 25th and that's been carried out over these long months. I think we've all gotten to know Pamela to a certain extent. We've seen her photograph and we know something about her life, and I think by virtue of this she will probably walk with all of us at least in some small way, the rest of our lives. But at least in my mind, one thing that stands out more than anything else and that is Pam's bravery and her desire to live, because she fought with every drop of blood in her body. And she fought with every ounce of strength to live, because she wanted to live. And this man took the most precious possession that any of us have and he took it away from her in a split second with no more regard than you or I [2696] would have for stepping on a bug on the sidewalk. But you remember her bravery, ladies and gentlemen, because you are about to go write the last chapter of this struggle. And I ask you to write one that will say "Pam, we haven't forgotten you and you didn't die in vain." And on behalf of the Moseley family, I thank you. On behalf of the Carpenter family, I thank you. But most of all, on behalf of Pam Carpenter who has no one to speak for her, thank you very much.

BY THE COURT: Ladies and gentlemen of the jury, you've heard the argument. At this time, you'll retire into the jury room. Before I release you, again the spectators will leave through this door. No one other than the lawyers go through this door. You can retire into the jury room to begin your deliberations. Mr. Starkey, would you take the Charge and hand it to the jury. All the evidence will go with them.

(Jury retires to deliberate at [2697] 2:06 P.M., April 2, 1980)

(Jury returns at 2:52 P.M., April 2, 1980)

BY THE COURT: I'll admonish you again, those of you that were here yesterday, the jury has reached a verdict and they're fixing to deliver the verdict in the Court. I'd ask that there be no outbursts from anyone in the Court room. Tell Mr. Starkey to bring in the jury. Would the attorneys approach the bench just a moment.

(Attorneys approach the bench)

(Discussion before the bench out of Court reporter's hearing)

(OFF RECORD)

BY THE COURT: Would the Clerk determine if the defendant and all twelve jurors are present.

BY THE CLERK: Yes, sir. They are.

BY THE COURT: All right. Let the record reflect that the defendant and all twelve jurors [2698] are present. Mr. Foreman, has the jury reached a verdict?

BY JURY FOREMAN: Yes, sir. We have.

BY THE COURT: All right. Would you hand the verdict to the bailiff?

BY JURY FOREMAN: (Complying)

BY THE COURT: Mr. Penry, would you rise?

DEFENDANT: (Complying)

BY THE COURT: The verdict of the jury is: Answer to special issue # 1, we the jury unanimously find and determine beyond a reasonable doubt that the answer to this special issue is yes, signed Chris T. Burkholder. Answer to special issue #2, we the jury unanimously find and determine beyond a reasonable doubt that the answer to this special issue is yes, signed Chris T. Burkholder. Answer to special issue # 3, we [2699] the jury unanimously find and determine beyond a reasonable doubt that the answer to this special issue is yes, signed Chris T. Burkholder, Foreman of the jury. And the general verdict: we the Jury return in open court the above answers as our answers to the special issues sub-

mitted to us and the same is our verdict in this case, signed Chris T. Burkholder, Foreman of the Jury. You can be seated, Mr. Penry.

(Defendant shoved large glass ashtray the length of counsel table to the floor and had to be restrained by the Sheriff and two Sheriff's Deputies)

BY MR. NEWMAN: We ask that the jury be polled, Your Honor.

BY THE COURT: All right. Mr. Foreman, is this the unanimous verdict of all twelve jurors?

[2700] BY JURY FOREMAN: Yes, sir. It is.

BY THE COURT: I'll ask each of you if this is your unanimous verdict to raise your right hand?

JURORS: (Complying)

BY THE COURT: Let the record reflect that all twelve jurors raised their right hand. Do you desire further polling of the jury by reading each juror's name, Mr. Newman?

BY MR. NEWMAN: Yes, Your Honor.

BY THE COURT: Would the Clerk read each juror's name and as your name—She'll ask each of you if this is your unanimous verdict by name, and you'll answer.

BY CLERK: Evelyn Stephens.

BY MS. STEPHENS: Yes.

BY CLERK: Is this your unanimous verdict?

BY MS. STEPHENS: Yes.

[2701] BY CLERK: Dennis Lane Davis.

BY MR. DAVIS: Yes.

BY CLERK: Is this your unanimous decision?

BY MR. DAVIS: Yes.

BY CLERK: Patricia Tipton.

BY MR. NEWMAN: Pardon. I believe the proper question is Is this your verdict?

BY CLERK: I'm sorry. Was this your unanimous verdict?

BY MR. NEWMAN: It's not unanimous verdict—it's just is this your verdict?

BY MS. TIPTON: Yes, it is.

BY CLERK: Connie Wars.

BY MS. WARS: Yes.

BY CLERK: Was this your verdict?

BY MS. WARS: Yes.

BY CLERK: Steve Delk.

BY MR. DELK: Was this your verdict?

BY MR. DELK: Yes.

BY CLERK: Tonie Ragland.

[2702] BY MR. RAGLAND: Yes.

BY CLERK: Was this your verdict?

BY MR. RAGLAND: Yes, ma'am.

BY CLERK: Chris Burkholder.

BY MR. BURKHOLDER: Yes.

BY CLERK: Was this your verdict?

BY MR. BURKHOLDER: Yes.

BY CLERK: Mary Birmingham.

BY MS. BIRMINGHAM: Yes.

BY CLERK: Was this your verdict?

BY MS. BIRMINGHAM: Yes, ma'am.

BY CLERK: Sammy Davis.

BY MR. DAVIS: Yes, ma'am.

BY CLERK: Was this your verdict?

BY MR. DAVIS: Yes, ma'am.

BY CLERK: Mrs. Randolph Gates.

BY MS. GATES: Yes.

BY CLERK: Was this your verdict?

BY MS. GATES: Yes, it was.

[2703] BY CLERK: Betty Jo Johnson.

BY MS. JOHNSON: Yes.

BY CLERK: Was this your verdict?

BY MS. JOHNSON: Yes.

BY CLERK: Ann Ramos.

BY MS. RAMOS: Yes.

BY CLERK: Was this your verdict?

BY MS. RAMOS: Yes.

BY THE COURT: Let the record reflect that all twelve jurors answered Yes, that it was their unanimous verdict. Do you desire to inspect the verdict, before I release the jury?

BY MR. NEWMAN: No, sir. That's all right.

BY THE COURT: The jury's verdict is received and filed. You've filed it.

BY CLERK: Yes.

BY THE COURT: Ladies and gentlemen of the jury, at this * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

No. L-86-89-CA

JOHNNY PAUL PENRY

vs.

O. LANE McCOTTER

[Filed April 28, 1987]

**ORDER DENYING FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS AND
DISSOLVING STAY OF EXECUTION**

Petitioner was sentenced to death following his conviction for the offense of capital murder. The gruesome facts of his crime and the manner of his conviction were sufficiently discussed by the Court of Criminal Appeals of Texas upon their affirmance of the judgment. See *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 834 (1986). Petitioner was scheduled to be executed before sunrise on May 7, 1986.

He began this first pursuit of a writ of habeas corpus on April 10, 1986. The state trial court denied his application on April 27, and the Court of Criminal Appeals did likewise on the afternoon of May 5. Petitioner then filed the present application pursuant to 28 U.S.C. § 2254. On May 6, this Court stayed the execution in order to allow adequate time for the presentation and consideration of petitioner's constitutional claims.

In his amended petition, filed on May 22, petitioner raised fifteen grounds for relief. For present purposes, these fifteen grounds will be grouped into six broad categories related to the chronological stages of petitioner's trial. He asserts four potential errors which he alleges denied him a full and fair suppression hearing; five grounds of error which he contends demonstrate that his two confessions should have been excluded; one ground concerning the allegedly improper granting of seven of the state's challenges for cause during jury selection; two potential errors made during the trial; two objections made to the charge given at the punishment phase; and one final argument that his sentence constitutes cruel and unusual punishment because of his limited mental capacity. Each allegation will be discussed in the framework of the broader categories.

In reaching its decisions on these matters, the Court had before it the entire transcript of petitioner's trial, including copies of exhibits, as well as appellate briefs and the opinion affirming the conviction on direct appeal, and copies of the materials submitted to the state courts seeking habeas relief which were denied before resort to this Court. The Court reviewed all relevant portions of these materials. See *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986) (nothing requires a federal court to review a record in its entirety). The State does not contest the fact that petitioner has exhausted his state court remedies on the claims now before this Court. The parties have agreed and the Court concurs that the present record covers all factual issues which may be raised in these proceedings, making it unnecessary to hold an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293, 313; see also Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

After careful consideration of the relevant portions of the record and of the briefs and argument of counsel, the Court has determined that petitioner has failed to

state any constitutional ground meriting relief. The Petition for a Writ of Habeas Corpus will be DENIED and the Stay of Execution DISSOLVED for the reasons which follow.

I. CRUEL AND UNUSUAL PUNISHMENT

Although last in a chronological sequence, petitioner's argument that his sentence constitutes cruel and unusual punishment deserves primary attention. It is grounded on the premise that a person who ostensibly thinks like a child should be treated like a child, and Texas does not execute children. Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1986) ("No person may, in any case, be punished by death for an offense committed while he was younger than 17 years.") In short, petitioner is asking for special consideration due to his limited mental capacity, and this request for special consideration permeates the remainder of his grounds for relief.

In challenging the constitutionality of a death sentence imposed upon a person of his mental ability, petitioner focuses on evidence bearing on his limited capacity. This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate

doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition. The fact remains that he was convicted of a heinous crime and sentenced to death. The question now is whether society will accord any additional consideration to his condition when determining the punishment it metes out.

The answer is apparently a three-fold no. First, the Texas statute designed to prohibit execution of children has no apparent application to adults with limited mental capacities. Second, while the Constitution requires that mental deficiencies be considered before imposing a sentence of death, it does not proscribe such a sentence for the mentally deficient. Third, the prohibition against execution of those unable to understand the reason for their punishment apparently does not apply to a person like Penry who has been adjudicated a competent man.

The Texas statute prohibiting execution of defendants who were younger than seventeen when they committed the offense speaks only of calendar age, not mental age. No Texas case has given the statute this broader meaning. See, e.g. *Beck v. State*, 648 S.W.2d 7, 9 (Tex. Cr. App. 1983); *Cammon v. State*, 672 S.W.2d 845, 851 (Tex. App.—Corpus Christi 1984, no pet.) (if under 17, life imprisonment is maximum penalty). Giving the statute this interpretation would open the floodgates in Texas courts to claims of "mental" age below seventeen in capital cases. Except for the minimal persuasive value of a Texas policy against executing children, this statute is of no help to petitioner.

Petitioner instead must rely on eighth amendment contentions of cruel and unusual punishment. To date

the Supreme Court has not held that the execution of mentally retarded defendants constitutes cruel and unusual punishment, however. Instead, the Court has merely required that juries consider why the death penalty should not be imposed as well as why it should be imposed (mitigating as well as aggravating factors). *Jurek v. Texas*, 428 U.S. 262, 271 (1976). Mental retardation is nothing more than one of the mitigating factors to be considered.

In *Jurek*, the Supreme Court upheld the facial validity of Texas' death penalty statute, finding that Texas apparently provided sufficient opportunities for the presentation and consideration of mitigating factors. *Id.* at 272; *Brock v. McCotter*, 781 F.2d 1152, 1157 n. 5 (5th Cir. 1986), *cert. denied*, 106 S.Ct. 2259 (1986) (Texas statute withstood challenge to its facial validity in *Jurek* and remains valid unless inconsistent with new Supreme Court case law). In this case, petitioner's mental capacity was considered by a jury in a competency hearing, at the guilt-innocence phase of the trial, and at the punishment phase of the trial. The jury was able to consider it as a possible mitigating factor at the punishment phase, thus satisfying constitutional requirements.

Finally, petitioner attempts to draw the Supreme Court's most recent pronouncement on insanity and punishment into this case. See *Ford v. Wainwright*, 106 S.Ct. 2595 (1986). Ford reaffirms prior law prohibiting the execution of the insane. *Id.* at 2602. In reciting the long history of this prohibition, the Court repeats a quotation from Blackstone indicating that lunatics and idiots should not be punished for their own acts if they were not truly aware of what they were doing. *Id.* at 2600.

Petitioner, however, does not qualify as an idiot in either the psychiatric or legal sense of that word. He was adjudicated competent by a jury which heard sub-

stantial evidence concerning petitioner's mental capacity. Given the plethora of testimony on both sides of the issues, this Court cannot say that the finding of competency was not fairly supported by the record. See 28 U.S.C. 2254(d)(8). As such, the finding of competency must be presumed correct. *Maggio v. Fulford*, 462 U.S. 111, 117 (1983); 28 U.S.C. § 2254(d).

This presumption has far-reaching implications in the present case. Most, if not all, of petitioner's grounds for relief are premised in part on his alleged incompetency or retardation. Petitioner contends, for example, that he could not have voluntarily waived his right to remain silent before he confessed, since his retardation made it impossible for him to say "no" to any authority figure. Petitioner may indeed be retarded, but his impairment is not so severe that he could not have knowingly and voluntarily waived his rights. He is legally competent.

Petitioner's request for habeas relief based on the allegedly cruel and unusual nature of his punishment is therefore DENIED.

II. THE SUPPRESSION HEARING

On February 29, 1980, the 258th District Court of Trinity County, Texas, heard petitioner's pre-trial motions to suppress evidence. *Jackson v. Denno*, 378 U.S. 368 (1984); R. Vol. 4 at 136-271. The hearing primarily centered on the suppression of State's Exhibits 4 and 6; two statements that petitioner gave to investigating officers in which he confessed to the rape and murder of Pamela Carpenter. At the suppression hearing, State's witnesses included the two officers who initially questioned petitioner, Chief of Police Smith who took petitioner's first written statement, Texas Ranger Cook who took petitioner's second written statement, the four individuals who witnessed the petitioner's signature, and the justice of the peace before whom petitioner initially appeared.

Petitioner did not testify and offered as his only witness Police Officer Page, the first law enforcement officer to arrive at the scene of the crime. The judge heard argument from counsel for both sides.

The objections voiced by petitioner regarding the two statements embraced two different substantive protections. First, petitioner contended that the confessions were not voluntarily given to officers and, therefore, should be suppressed because their admission would violate his right to be free from compelled self-incrimination. U.S. Const. amend. V and XIV; *Miranda v. Arizona*, 384 U.S. 436 (1966). Second, petitioner argued that all statements were made following an illegal arrest and, therefore, should be excluded under the "fruit of the poisonous tree" doctrine. U.S. Const. amend. IV; *Wong Sun v. United States*, 371 U.S. 471 (1963).

The trial court denied the motions to suppress the two statements. Tr. 94-95; R. Vol. 4 at 270. Regarding voluntariness, the trial judge found that petitioner "was not induced or caused by any person to give or make such written statement[s] by threats, persuasion, compulsion, intimidations, violence, promises, unlawful detention or anything else other than the free and voluntary act" of the petitioner, and therefore his conclusion that no constitutional rights were violated.

The trial judge also found that petitioner was taken before Justice of the Peace Galloway in Livingston, Texas, who warned petitioner that he was charged with capital murder and of the rights incorporated into Art. 15.17 of the Texas Code of Criminal Procedure on October 25, 1979, the day of his arrest. Further, he found that petitioner was warned by the officer to whom each statement was made of all the rights set forth in Art. 38.22 of the Texas Code of Criminal Procedure. The trial judge found that petitioner knowingly and voluntarily waived these rights.

The trial judge impliedly found that the petitioner was not under arrest when his first oral confession was made. R. Vol. 4 at 270. Petitioner was clearly under arrest when the two written statements were taken. R. Vol. 4 at 199.

Under 29 U.S.C. § 2254(d) a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply. *Miller v. Fenton*, 106 S.Ct. 445 (1985); 28 U.S.C. § 2254(d). The voluntariness of a confession is not a factual issue entitled to the § 2254(d) presumption of correctness, but is a purely legal question subject to independent federal review. *Id.* at 451. In other words, the ultimate legal conclusion of whether under the totality of the circumstances petitioner's statement was the product of his free will or the product of circumstances overbearing his free will is not presumed to be correct, regardless of the § 2254(d) exceptions. When voluntariness is challenged on habeas corpus review it is subject to plenary federal determination. *Id.*; see also *Brantley v. McKaskle*, 722 F.2d 187 (5th Cir. 1983). However, this Court believes that there is fair support in the record for the underlying factual findings and is bound by the presumption of correctness of those findings made by the trial court, concerning the absence of threats, persuasion, compulsion, intimidation, violence, promises and unlawful detention. *Miller*, 106 S.Ct. at 453; 28 U.S.C. § 2254(d) (8).

Although the first four points in petitioner's application challenge aspects of the *Jackson v. Denno* hearing, it is clear to the Court that they do not directly challenge the legal conclusion that his confessions were not voluntary. Rather, they focus on alleged flaws in the state court proceeding which allegedly denied him a full and fair suppression hearing. In other words, petitioner has focused on the "historical" facts which support the legal conclusion that his confessions were given volun-

tarily. These historical facts are entitled to a presumption of correctness unless petitioner can persuade the Court that one or more of his first four grounds, if true, did deny him a full and fair hearing.

It is at this point that some confusion exists. On the one hand, petitioner has stipulated that the record now before the Court is factually complete, and he agrees with the State that no evidentiary hearing is necessary. On the other hand, the grounds raised in his first four points would make another evidentiary hearing necessary in the state court, since such a hearing is the remedy available to petitioner if this Court finds his state hearing was not full or fair. *Sigler v. Parker*, 396 U.S. 482 (1970). Prevailing on one of these four points would destroy any presumption of correctness accorded to the historical facts, and would require an evidentiary hearing, but would not alone warrant vacating the state court judgment. It is with this understanding that the Court considered the initial four grounds of petitioner's application.

In these first four grounds for habeas corpus relief petitioner asserts that he was denied a full and fair suppression hearing because of: (1) the failure of the State to produce all statements made by petitioner to peace officers pursuant to the trial court's discovery order; (2) the failure of Billy Ray Nelson to testify truthfully at the suppression hearing; (3) the failure of the prosecutor to inform petitioner that he was the focus of the criminal investigation; and (4) the failure of the trial court to approve additional funds for an investigator to interview witnesses on petitioner's behalf.

a. Background

It is clear that petitioner has the constitutional right to have "a fair hearing and a reliable determination of the issue of voluntariness." *Jackson v. Denno*, 378 U.S.

368, 377 (1964), and that the guarantees of due process call for a "hearing appropriate to the nature of the case." *United States v. Raddatz*, 447 U.S. 667, 677 (1980) quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 327 (1937). In the sense of a federal habeas corpus proceeding alleging constitutional error in a state court suppression hearing, the federal district court should determine upon independent review that material facts were adequately developed and that petitioner had a "full, fair, and adequate opportunity to present all relevant facts at the suppression hearing." See e.g. *Nix v. Williams*, 104 S.Ct. 2501, 2512 (1984). It is through these flexible standards of due process that this Court must sift petitioner's claims of a denial of a full and fair suppression hearing. After a full review of the suppression hearing transcript, briefs, and applicable law the Court finds that petitioner's claims are without merit.

b. Confessions of Petitioner

Petitioner claims that he was denied his due process right to a full and fair suppression hearing because the prosecutor failed to disclose, pursuant to the trial court's discovery order, an oral statement made by petitioner in 1977 in which he confessed an unrelated rape to law enforcement officials. Petitioner argues that this information constituted evidence relevant to his propensity to confess to a crime even if he was actually innocent. Further, petitioner contends that the failure to disclose this information constitutes a denial of due process, in the context of a suppression hearing, analagous to a prosecutor's failure to disclose exculpatory evidence admissible in the guilt or punishment phase. See *Brady v. Maryland*, 373 U.S. 83 (1963). The Court is not persuaded.

First, the record reflects that defense counsel were provided with a copy of State's Exhibit 6, petitioner's confession to the Carpenter rape-murder, which contained the substance of petitioner's confession to the prior unre-

lated rape. This document was before counsel and the trial court prior to and during the confession suppression hearing, and it was in fact the focus of the hearing. This remains true even assuming that petitioner neither informed counsel of his previous confession nor had the mental capacity to do so,¹ and that defense counsel failed to elicit the information on its own. Counsel was armed with the substance of that previous confession in petitioner's signed statement of October 26, 1979, but did not present evidence or argue the "suggestibility" point in the *Jackson v. Denno* hearing. Therefore, the default of the State, if any, in failing to comply with the discovery order was not of the magnitude of a denial of due process.

Even absent these facts the Court is of the opinion that petitioner's initial ground is meritless. Petitioner contends the State's failure to disclose a prior unrelated confession deprived him of a full and fair suppression hearing because the undisclosed information was relevant to petitioner's propensity to confess to acts which he did not commit. He argues that under *Brady*, this failure to disclose information rendered the suppression hearing constitutionally infirm.

Brady stands for the proposition that the prosecutor's suppression of evidence favorable to an accused violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecutor. *Brady*, 373 U.S. at 87; *Matheson v. King*, 751 F.2d 1432 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1798

¹ Petitioner contends that Penry's highest level of achievement was the ability to "prepare an egg" and perforce he was unable to provide this information to his defense counsel. This addresses the issue of competency. After a full and fair hearing a jury decided petitioner was competent to stand trial and assist in his defense. R. 7 at 944; *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (competency finding entitled to the presumption of correctness); *see supra* section I.

(1986). Petitioner's own argument negates his position on the *Brady* issue. The materiality of the prior statements, if any, goes to the issue of voluntariness, not guilt or punishment. Neither guilt nor punishment was before the trial court in the *Jackson v. Denno* pre-trial suppression hearing. This Court finds no reason or authority supporting petitioner's position for extrapolating the protections of *Brady* to the pre-trial suppression hearing. *Brady* guarantees that a defendant will not be judged guilty without access to exculpatory evidence that the prosecutor has in his possession but that is unknown to the defendant. Having stated the rule, its inapplicability in this context cannot be more clearly demonstrated. The prior confession is neither exculpatory of the crime under investigation nor is it information unknown to the defendant. Petitioner's reliance on *Brady* and *United States v. Agurs*, 427 U.S. 97 (1976) (duty to disclose *Brady* material pursuant to a general request) is misplaced.

c. Testimony of Deputy Sheriff Nelson

Petitioner's second ground assaults the suppression hearing testimony of Deputy Sheriff Billy Ray Nelson. R. 4 at 136-159. Petitioner alleges that Nelson failed to testify to the whole truth at the suppression hearing and as a result left the false impression with the trial court that petitioner was not under arrest at the time of petitioner's first oral confession. Petitioner's sole basis for this claim is found in the alleged discrepancies in Nelson's testimony cited by petitioner. *See* R. Vol. 4 at 141 and 163, R. Vol. 14 at 1625-28 and 1621-22.

After an examination of the relevant testimony the Court finds no basis for an inference that Nelson testified falsely other than petitioner's conclusory allegations. To the extent that petitioner perceives discrepancy in the testimony offered by Nelson there are no allegations to raise a fact issue of whether the testimony was know-

ingly given falsely or that the testimony was material to any decision rendered by the trial court. See e.g., *Giglio v. United States*, 405 U.S. 150 (1972); *Williams v. Griswald*, 743 F.2d 1533 (5th Cir. 1984). In light of the counsel's opportunity to attack Nelson's credibility by further cross-examination and the total record in the suppression hearing, the Court is unable to find that petitioner was denied a full and fair hearing based on the discrepancy of testimony, if any, by Nelson. Again, Petitioner's reliance on *United States v. Agurs*, 427 U.S. 97 (1976) is misplaced and this ground of relief is without merit.

d. Petitioner as the focus of the investigation

Petitioner states that at the suppression hearing "[t]he most important issue . . . was when exactly petitioner was effectively under arrest." R. Vol. 12, at 1595-96. Petitioner argues that he was denied a full and fair hearing because District Attorney Price failed to disclose that after his initial encounter with petitioner his investigation had focused on petitioner and the prosecutor knew Penry would be on trial for the offense. Petitioner contends that this proves he was under arrest from the moment he first met with Price. This contention was decided adversely to petitioner by the trial court, R. Vol. 4 at 270, in the suppression hearing and subsequently affirmed by the Texas Court of Criminal Appeals. *Penry*, 691 S.W.2d 645-46. Even if it was true that petitioner was the focus of the criminal investigation, it is irrelevant to the question of whether he received a full and fair suppression hearing. The trial court properly held a hearing to determine whether the acts of law enforcement officers in obtaining the petitioner's confession were in accordance with accepted constitutional limitations on criminal procedure. If their acts were found to be within constitutional bounds, the confessions would be admissible in the prosecution of this case. Of course, if they

acted beyond the bounds of accepted constitutional law then the confessions must be excluded from evidence.

In addressing the precise issue raised as a ground for habeas corpus relief the question is not, as petitioner has framed it, whether criminal investigators acted within permissible constitutional standards, but whether the trial court afforded petitioner a full and fair opportunity to challenge the constitutionality of their conduct. From this perspective, it is irrelevant whether petitioner was in fact the focus of the investigation or whether he was informed of this fact. The trial court determined following a full and fair hearing consisting of testimony and argument of counsel that petitioner was not in custody when he made his first inculpatory statement to officers and that all oral and written statements were given freely and voluntarily. There is nothing in the record before the Court to indicate that petitioner was denied a full and fair opportunity to challenge official conduct with regard to his investigation.

e. Investigator expenses

Finally, petitioner contends that he was denied a full and fair suppression hearing because the trial court allowed only \$500.00 for payment of investigation fees and denied petitioner's request for an amount of up to \$3,000.00. Tr. 33. See Tex. Code Crim. Proc. Ann. art. 26.05 (Vernon 1981). The Court is unable to find error of constitutional magnitude in the trial court's action. Tr. 63 & Tr. 7.

Petitioner argues that unspecified testimony was given at petitioner's trial and that this testimony was material to the issue of suppression and would have been discovered but for the denial of additional funds. These conclusory statements are unsupported by factual allegations, identifications of the evidence, demonstration of its materiality, or a showing of prejudice to the petitioner.

As such, they do not raise a constitutional issue. *Mayberry v. Davis*, 608 F.2d 1076 (5th Cir. 1979); *Schlang v. Heard*, 691 F.2d 796 (5th Cir. 1982).

Second, no record was made in the trial court of petitioner's particular need for the funds or the harm he would suffer by their denial. The investigator stated that he was aware of the listed witnesses, had seen the offense report, and was provided with copies of the witnesses' statements (with the exception of petitioner's family members). When asked about the scope of the investigation, his reply was to investigate whatever was asked of him. See R. Vol. 3 at 66-69. This Court cannot find an abuse of discretion under state standards, see e.g. *Phillips v. State of Texas*, 701 S.W.2d 875, 894-95 (Tex. Cr. App. 1985), and more importantly cannot find an error that renders the hearing or trial so fundamentally unfair that rise to a due process violation, for which the writ will issue. *Banzavechia v. Wainwright*, 658 F.2d 337, 340 (5th Cir. 1981).

In conclusion, petitioner has not shown that an exception to the § 2254(d) presumption of correctness is applicable. Therefore, this Court would not be justified in disregarding the presumption of correction that clothes the trial court's findings on historical facts. Such a showing is a prerequisite to an evidentiary hearing in this Court of rehearing on the voluntariness issue in state court. Further, petitioner has not alleged facts stemming from the pre-trial hearing that, if true, would establish that petitioner had been deprived of constitutional rights by use of an involuntary confession. *Procurier v. Atchley*, 400 U.S. 446, 454 (1971). Petitioner has not been denied due process when he has been given the opportunity to confront the state's witnesses with the aid of competent counsel, hear the State's evidence, present his own evidence, and to offer argument of the trial court in support of his position. The fundamental requisite of due process is an opportunity to be heard. *Ford*

v. Wainwright, 106 S.Ct. 2595 (1986). The record fully supports the conclusions that the *Jackson v. Denno* hearing provided petitioner with that opportunity and that no constitutional error infected the proceeding.

III. CONFESSIONS

For the purposes of this application for habeas corpus, the relevant facts are as follows. 28 U.S.C. § 2254(d). On the morning of October 25, 1979, Billy Ray Nelson and Bob Grissom, deputies of the Polk County Sheriff's Department were on patrol in Livingston, Texas. At that time, they received a radio transmission from the department dispatcher concerning a stabbing and possible rape of a woman in Livingston. The radio report included a general description of the assailant.

Deputy Nelson knew that petitioner had recently been paroled from the Texas Department of Corrections on a rape conviction and knew that petitioner fit the description of the assailant. At that time, petitioner was living with his father in Livingston. Around 11:00 A.M., the deputies drove to the home of petitioner's father to determine if petitioner was there and if he knew anything about the crime. Upon finding him at home, the officers asked petitioner if he would accompany them to the police station to answer a few questions. Petitioner agreed to go with the men, but requested that he be allowed to put on a shirt first. The officers agreed and then drove petitioner to the police station.

Upon arrival, Officer Nelson noticed a blood stain soaking through the back of petitioner's shirt. Petitioner explained that he had been injured in a bicycle accident earlier in the day and displayed a puncture wound on his shoulder blade. Since the shirt petitioner was wearing did not have a hole in the back, Officer Nelson asked if he could see the shirt worn at the time of the injury. Petitioner agreed and after *Miranda* warnings were read

and waived petitioner signed a consent to search form for the shirt. The consent was given at 12:10 P.M. and witnessed by Ted Everitt, an investigator for the district attorney and Deputy Grissom.

Petitioner accompanied the men back to his father's house and retrieved a western-style shirt and undershirt for them. The shirts were marked with puncture holes corresponding to the wounds on petitioner's back.

At this time, the officers asked petitioner if he would be willing to accompany them to the scene of the crime. Petitioner agreed, and voluntarily accompanied them to the Carpenter home. Upon arrival at the scene, the patrol car was parked in front and petitioner remained in the back seat with the back door open. Deputies Nelson and Grissom were with him at times and, periodically, walked around the house and patrol car. The district attorney and his investigator were in the house.

After about forty-five minutes, petitioner voluntarily made the statement to the deputies that he wanted to talk and tell the truth. After being warned, petitioner made an oral confession to the officers of the attack on Pam Carpenter. Petitioner's statements were not induced by interrogation, threats, or coercion.

Deputy Nelson reported the statement to the district attorney and petitioner was brought into the Carpenter home where he was able to identify his pocket knife, the scissors used to stab Pamela Carpenter, and the room in the house where the stabbing occurred. Petitioner was then taken to the Livingston Police Department and formally charged with capital murder. At approximately 2:45 P.M. petitioner was taken before Justice of the Peace Galloway in Livingston, given the magistrate's warning, and informed that he was charged with capital murder. During this appearance before Judge Galloway, petitioner's father was present and cautioned petitioner not sign waiver form. Petitioner's father then read peti-

tioner his rights until he finally asked petitioner if he committed the crime. When petitioner responded affirmatively, his father left in anger.

Chief Smith then asked petitioner if he would be willing to give a statement, to which petitioner agreed. At about 3:25 P.M. petitioner was again warned and then proceeded to give an oral statement to Chief Smith. Chief Smith took down the statement and had it typed. The typed statement was read to petitioner in its entirety to make sure he understood it and had no questions. Two civilian witnesses were brought in off the street and again, the entire statement and warnings were read back to petitioner in the presence of the witnesses. Petitioner agreed that it was correct, made no changes when given the opportunity, then signed the document in the presence of the witnesses. This first statement confessed the crime of aggravated rape. *Penry* 691 S.W.2d at 642.

On October 26, 1979, a second statement was taken by Texas Ranger Maurice Cook. Petitioner was again warned of his rights prior to the statement. Cook not only read the warnings but explained them in detail to insure petitioner's understanding. After full explanation, Cook was satisfied that petitioner knew and understood his right to remain silent, to have a lawyer present during questioning, that he could have a lawyer appointed if he could not afford one, and the right to end the statement at any time. Petitioner then gave a more historically detailed oral statement, although the facts surrounding the rape and stabbing of Pamela Carpenter were relatively the same. The statement was typed from Ranger Cook's notes taken during petitioner's oral statement. The typed copy was then read to petitioner in its entirety in the presence of two civilian witnesses. At the conclusion, petitioner asked to make one handwritten addition to the statement which was done. Petitioner signed and initialled the document. At no time during the interrogation was petitioner subjected to threats,

duress, promises of leniency, or any form of official coercion. At no time did he invoke his right to remain silent or express a desire to have a lawyer present or to terminate the interview. There is no evidence in the record that the second confession was taken merely for the purposes of enhancing punishment or securing the death penalty. The second written confession also constitutes an admission of aggravated rape. *Penry*, 641 S.W.2d at 642.

Petitioner filed a motion to suppress the two statements. After a full and fair pre-trial *Jackson v. Denno* hearing the trial court denied the motion to suppress and held the confessions admissible into evidence.

Petitioner argues that the trial court's decision to admit into evidence the statement made by petitioner to Chief Smith on October 25, 1979, and the statement made to Texas Ranger Cook on October 26, 1979, was unlawful for the following reasons: (1) the confessions were the fruit of an illegal arrest; (2)* the officers did not use petitioner's exact words in writing the statements; and (3) both statements were made without petitioner's knowing relinquishment of the right to remain silent. Each argument is discussed briefly below.

1. *Fruit of an illegal arrest*

Petitioner contends that at the time of his initial oral confession to Deputies Nelson and Grissom that he was under arrest without probable cause. Petitioner premises this conclusion on the assumption that from the moment he left his father's house with the deputies he was under arrest. The state concedes probable cause for his arrest did not exist until he made the inculpatory statements in front of the Carpenter house. Therefore, the two confessions that followed the fourth amendment violation are "tainted fruit of the poisonous tree" and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The state contends that *Stone v. Powell*, 428 U.S. 465 (1976) controls and petitioner's fourth amendment claims are not reviewable in this Court on application for habeas corpus. *Stone* held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at this trial." *Id.* at 494 (footnotes omitted). See also *Caver v. Alabama*, 577 F.2d 1188, 1191-92 (5th Cir. 1978).

The trial court found, and the state concedes, that the petitioner was not under arrest prior to his initial oral confession. Even assuming that finding is incorrect, and that petitioner was under arrest illegally, does not change the fact that petitioner had a full and fair opportunity to litigate his fourth amendment claims in the trial court, R. Vol. 4 at 270-71, and on direct appeal. See *Penry*, 636 S.W.2d 645. *Williams v. Brown*, 609 F.2d 216-219-20 (5th Cir. 1980) (bar applies even if state court decided issue incorrectly.)

The trial court record fully supports the conclusion that the fourth amendment theory was raised before the trial judge, and that the Texas Court of Criminal Appeals considered and rejected this theory. *Penry*, 691 S.W.2d at 644 and 646. No factual allegations have been made that petitioner was denied a full and fair opportunity "to litigate a claim arising out of a putatively illegal search and seizure." *Billiot v. Maggio*, 694 F.2d 98 (5th Cir. 1982). Federal review on habeas corpus is thereby foreclosed. *Wicker v. McCotter*, 783 F.2d 487, 498 (5th Cir. 1986), *cert. denied*, 106 S.Ct. 3310 (1986); *Billiot*, 694 F.2d at 695.

2. *Failure to use petitioner's exact words*

Petitioner contends that his statements to Texas Ranger Cook and to Chief Smith should have been suppressed

because neither Cook nor Smith used petitioner's exact words in writing the statement. The State argues that petitioner failed to object to the admission of the confessions on this specific ground and, therefore, has waived direct or collateral review for failure to comply with Texas contemporaneous objection rule. Alternatively, the State argues the record clearly supports the conclusion that the content of the statement was not altered by the officers taking down the statement.

Petitioner's response is that the contemporaneous objection rule was satisfied by the Motion to Suppress, Tr. 74, which states that "[a]ll statements of the Defendant . . . were obtained illegally, in violation of Defendant's rights conferred by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution"

During the pre-trial *Jackson v. Denno* hearing, petitioner's counsel did not question Chief Smith about the exact wording of State's Exhibit 4, the October 25, 1979, statement. However, Maurice Cook was cross-examined about the wording of petitioner's second statement given on October 26, 1979. R. Vol. 4 at 227-28. The statements were admitted into evidence for purposes of the suppression hearing without objection. R. Vol. 4 at 201, 237.

During the guilt phase of the trial the first statement, State's Exhibit 47, was admitted over the following defense objections: (1) renewal of all objections in the motion to suppress; (2) the statement does not comply with Tex. Code Crim. Proc. Ann. art. 38.22; (3) the statement was involuntary; (4) the statement was "fruit of the poisonous tree"; and (5) admission violates *Miranda* and *Atwell v. United States*, 398 F.2d 407 (5th Cir. 1968). No specific objection was raised concerning the exact wording of the statement. R. Vol. 15 at 1894 and 1867. All objections were overruled.

State's Exhibit 48-S, the second statement given by petitioner and taken by Ranger Cook, was admitted into evidence over the following objections: (1) the second statement was the fruit of a prior illegal statement; (2) the statement was involuntary; (3) the statement does not comply with Tex. Code Crim. Proc. Ann. art. 38.22; and (4) its admission into evidence violates *Miranda* and *Atwell*. All objections were overruled.

Finally, in the punishment phase State's Exhibit 48-S-2, a redacted version of the second statement, was admitted over the defendant's general objection that was "heretofore stated in the suppression hearing and main trial." R. Vol. XVII at 2603-2608.

The record is clear that defense counsel did not raise the specific objection that petitioner's statements were inadmissible because they were not verbatim transcriptions. Further, petitioner did not raise the issue as a ground of error on direct appeal of his conviction, see *Johnny Paul Penry v. State*, Brief for Appellant, p. 2-5, but did so for the first time in his application for habeas corpus, *Ex parte Johnny Paul Penry*, Application for Writ of Habeas Corpus to the 258th Judicial District Court, p. 2.

Respondent now argues procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982). Because the state court did not specify whether habeas relief was denied on the merits or due to procedural default, this Court is left to make the determination from the stipulated record. See generally *O'Bryan v. Estelle*, 714 F.2d 365, 383-85 (5th Cir. 1983); *Preston v. Maggio*, 705 F.2d 113 (5th Cir. 1983).

In making that determination the district court is directed to consider

[w]hether the court has used procedural default in similar cases to preclude review of the claim's merits, whether the history of the case would suggest

that the state court was aware of the procedural default, and whether the state court's opinions suggest reliance upon procedural grounds or a determination of the merits.

O'Bryan, 714 F.2d at 384 (quoting *Preston*).

The Texas cases reveal that "when the objection raised at trial is not the same as that urged on appeal, the complaint is not properly preserved for review." *Guzmon v. State*, 697 S.W.2d 404 (Tex. Cr. App. 1985) (citations omitted). *Buxton v. State*, 699 S.W.2d 212 (Tex. Cr. App. 1985), clearly states that if the error raised on appeal does not comport with the trial objection, no error was preserved. *Id.* at 217.

Second, this procedural error was clearly pointed out to the state court by respondents in their response to the application for habeas corpus. See Respondent's Original Answer to Petitioner's Application for Writ of Habeas Corpus to the 258th Judicial District Court, par. III(6). Therefore, it is reasonable to conclude that the state court was aware of the procedural default.

Petitioner offers no "cause" to excuse the failure to specifically object to the wording of the statements. He offers only that his Motion to Suppress raised all objections, therefore, no procedural default could follow. The Texas cases suggest to the contrary.

Based on the above discussion the Court is of the opinion that procedural default in the state courts, not justified by "cause" precludes review of the merits of petitioner's claim in this Court.

However, even absent procedural default, petitioner has not identified a single error or discrepancy attributable to the officers' conduct. His conclusory allegations and failure to state specific facts that, if true, would warrant habeas relief, do not properly raise a constitutional issue. *Schlang, supra*.

3. Right to remain silent

a. *Miranda* and Voluntariness

Petitioner contends, in grounds for relief 13 and 14, that his statements of October 25, 1979, to Chief Smith and October 26, 1979, to Ranger Cook should have been suppressed by the trial court because they were made without a knowing relinquishment of petitioner's right to remain silent in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). However, a fair reading of the arguments supporting these grounds for relief requires this Court to address not only the issue of validity of the waiver of petitioner's *Miranda* rights which are grounded in the Fifth Amendment and made applicable to the states through the fourteenth amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), but also the issue of the voluntariness of the confessions themselves under a fourteenth amendment due process analysis. In support of the former argument, petitioner relies on *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972); and in support of the latter he relies on *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 1001, 1014 (1981).

b. *Miranda* and the Two Confessions

The Supreme Court recently discussed the proper standard of review of a question concerning the validity of the waiver of a *Miranda* right in *Moran v. Burbine*:

Echoing the standard first articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444, 475. The inquiry has two distinct dimensions. *Edwards v. Arizona, supra*, 451 U.S. at 482, *Brewer v. Williams*, 430 U.S. 387, 404 (1977). First the relinquishment of the right must

have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision of abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). See also *North Carolina v. Butler*, 441 U.S. 369, 374-375 (1979).

106 S.Ct. 1135, 1141 (1986).

Applying the above standard to the present case, the Court has no difficulty in determining that petitioner received and waived multiple valid warnings during his brief detention prior to his two confessions and, further, that immediately prior to each confession, petitioner was warned and given explanations of the warnings and rights guaranteed him. The record reflects that prior to his first written statement, petitioner was warned no less than four times that he had a right to remain silent. Prior to the second confession, which was taken by Ranger Cook, petitioner was again given a complete set of warnings and an explanation of his rights.

Petitioner's waiver of his right to remain silent and concomitant decision to speak was voluntary in the sense that "it was the product of a free and deliberate choice rather than intimidation, coercion or deception. *Id.* The evidentiary records from both the *Jackson v. Denno* hearing and the competency hearing are devoid of any evidence of overreaching by law enforcement to gain petitioner's confessions. See generally R. Vol. 4 at 136-271; R. Vol. 6 at 478-550. No evidence was ever offered that suggested petitioner was physically intimidated or psychologically coerced by the actions or techniques of his

interrogatories, any representations or promises made by them or any other factor that would allow this Court to find that state coercion, rather than free choice, prompted the confessions. Even petitioner's testimony negates any such inference. Petitioner affirmatively stated at his competency hearing that neither Chief Smith or Ranger Cook ever mistreated him or promised him anything. R. Vol. 6 at 534.

Second, the Court finds from the evidentiary record that petitioner's right to remain silent was waived with his awareness of his right and the consequence of the decision to abandon it. 106 S.Ct. at 1141. Petitioner testified that his rights were not only read but explained as well prior to his confessions. R. Vol. 6 at 535. This is consistent with the testimony of Chief Smith and Ranger Cook offered at the *Jackson v. Denno* hearing. He knew that he was charged with murder, R. Vol. 6 at 539, and what that meant. Contrary to petitioner's present contentions, the record demonstrates that he was aware of his right to remain silent in the face of questioning. Petitioner's testimony affirmed that Ranger Cook told him of his right to remain silent and added "what that means is you don't have to talk." R. Vol. 6 at 535.

Further, the record supports that with each set of warnings, petitioner was told that if he chose to talk, his statements could be used against him in a court of law. During the competency hearing, petitioner testified that he knew what that meant. Whether he understood the full extent the statements could be used and the possible ramifications of each use is not in this record. However, that level of understanding is not required to make a valid waiver of *Miranda*.

In *Oregon v. Elstad*, 105 S.Ct. 1285 (1985) the Supreme Court stated:

This Court has never embraced the theory that a defendants ignorance of the full consequences of his

decisions vitiates their voluntariness. . . . Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all the consequences flowing from the nature and quality of the evidence in the case.

Id. at 1297-98. It is sufficient in the opinion of this Court that petitioner knew and understood that as a consequence of abandoning his right to remain silent that statements made by him could be used to secure his conviction and punishment for the offenses charged. *Miranda*, 384 U.S. at 469.

After independent review of the evidentiary record, the Court is of the opinion the totality of the circumstances demonstrates both an uncoerced decision and an appreciation of its possible consequences by petitioner, and that he was competent to make such a choice. Therefore, the Court is not persuaded that the totality of the circumstances affecting petitioner produced a waiver of the right to remain silent that was involuntary.

c. *Due process and the Two Confessions*

The trial court determined after a full and fair *Jackson v. Denno* hearing that the confessions of October 25 and October 26 were made voluntarily. While the underlying factual findings that support that legal conclusion are entitled to a presumption of correctness, 28 U.S.C. § 2254(d), the ultimate conclusion of "voluntariness" is subject to plenary review in the federal court. *Miller v. Fenton*, 106 S.Ct. 445, 450 (1986).

Petitioner contends that his confessions to Chief Smith and Ranger Cook were not voluntary for the following reasons: (1) petitioner was susceptible to pressure; (2) petitioner was not told that his confessions could be used by the State to seek the death penalty; (3) the statements are highly suspect because they were typed from the

notes of the officers rather than verbatim transcriptions of petitioner's actual words; and (4) with respect to the second confession only, that it was taken "for prosecutorial purposes in their drive for the death penalty," because it elicited facts that made petitioner's conduct look more deliberate and likely to continue. See Petitioner's Amended Application for Writ of Habeas Corpus, pp. 44-45.

Prior to *Miranda* the voluntariness of a confession of a suspect was measured against the requirements of the Fourteenth Amendment Due Process Clause. Statements "obtained by techniques and methods offensive to due process," *Haynes v. Washington*, 373 U.S. 503, 515 (1963), or under circumstances in which the suspect clearly had no opportunity to exercise "a free and unconstrained will," *id.* at 514 were inadmissible. See *Oregon v. Elstad*, 105 S.Ct. 1285 (1985). Once past the *Miranda* issue, discussed *supra*, "the primary criterion of admissibility remains the 'old' due process voluntariness test." *Elstad*, 105 S.Ct. at 1293, quoting *Schulhofer, Confessions and the Court*, 79 Mich. L. Rev. 865, 877 (1981).

The Fifth Circuit in *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001, 1014 (1981) held:

[I]n order to find [the defendant's] confession voluntary, we must conclude that he made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him.

More recently, the Supreme Court addressed the issues of free will, voluntariness and due process in *Colorado v. Connelly*, 55 U.S.L.W. 4043 (1986), and held that "absent police conduct causally related to the confession, there is simply no basis for concluding that any state

actor has deprived a criminal defendant of due process of law." *Id.* at 4045. The Court went on to hold that "coercive police conduct is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of Due Process of the Fourteenth Amendment." *Id.* at 4046, and rejected the contention that mental or psychological pressure alone would invalidate an otherwise valid confession.

In this collateral proceeding, the burden of proving involuntariness rests with the habeas corpus applicant. See *Jurek*, 623 F.2d at 937; *Bruce v. Estelle*, 536 F.2d 1051, 1058-59 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977). With regard to both confessions, the Court is of the opinion that after independent review of the record, the *Jackson v. Denno* hearing, the competency hearing, and totality of the circumstances that petitioner has not demonstrated a denial of due process.

"The determination of voluntariness of a confession requires the Court to consider the 'totality of the circumstances—both the characteristics of the accused and the details of the interrogation.'" *U.S. v. Gordon*, 638 F. Supp. 1120 (W.D. La. 1986) quoting *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

At the time, petitioner was a young and psychically healthy man. It is conceded by the state that petitioner is a man of limited mental abilities. Both his lack of education, *Payne v. Arkansas*, 356 U.S. 560 (1958), and low intelligence, *Fikes v. Alabama*, 352 U.S. 191 (1957) are characteristics that must be considered in this case. The record reflects that law enforcement officials that dealt with petitioner were aware of his limited capabilities, but rather than exploit his deficiencies, attempted to compensate for them. No evidence was offered that interrogators exploited petitioner's limited mental abilities to deceive petitioner, minimize his crime, or break his psychological resistance with unreasonable or improper in-

terrogation techniques or surroundings. All evidence points to the contrary.

Second, there is no evidence that petitioner's immediate environment generated a psychological coercion to bend or break his will to resist interrogation. There has been no allegation that the time, place, or manner of questioning was inherently coercive. Both confessions were taken within a span of two days. Petitioner spoke with and was cautioned by his father at the appearance before Justice of the Peace Galloway. Petitioner never requested the assistance of a lawyer. The questioning sessions were not unduly long, and the evidence tended to show they were interrupted rather than continuous.

The *Elstad* decision concedes that criminal suspects may be susceptible to various pressures that may ultimately yield a confession. But if the source of the coercion or pressure calculated to break the suspect's will does not emanate from law enforcement, then no Fourteenth Amendment rights have not been abridged. *Id.* at 1291. In other words, if a confession flows merely from a suspect's choice to tell the truth, to clear his conscience or even to minimize his culpability, due process is not offended.

Petitioner's next point is that he could not have made a voluntary confession without knowledge that the State could use the information to seek the death penalty. *Miranda* makes clear that the warning of a defendant of his constitutional right to remain silent serves two purposes. First, the warning is given to inform a possibly unknowing person of his right and to assure him that it will be honored. Second, the warning must be followed with an explanation that "anything said can and will be used against the individual in court." *Miranda*, 384 U.S. at 469. This admonition is not given to advise the suspect of the possible range of fines and penalties he may suffer upon a subsequent conviction, but rather is to bring

home to a suspect an awareness of the consequence of speaking and that "he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Id.*

As noted previously, the Supreme Court "... has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." 105 S.Ct. at 1297; or "that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all the consequences flowing from the nature and quality of the evidence in the case." 105 S.Ct. 1297-98. Although spoken in the context of *Miranda* waiver, it is equally applicable here. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment context." *Connelly*, 55 U.S.L.W. at 4047.

In *Connelly*, Justice Stevens concluded that where defendant was incompetent to stand trial he was not competent to waive his right to remain silent. *Id.* 4047-48 (Stevens, J. concurring in part and dissenting in part). Accepting his premise, then surely the converse must follow, that where an accused is found competent to stand trial, he must at a minimum have the capability to waive a constitutional right, even though an actual finding of waiver requires evaluation of additional circumstances. Justice Stevens continues, "the mere absence of police misconduct does not establish that the suspect has made a free and deliberate choice when the suspect is not competent to stand trial." *Id.* at 4048 n. 5. In this case, where a jury has found petitioner competent *plus* the absence of any evidence of police misconduct strengthens this Court's conviction that the right to remain silent was validly waived. See *Reddix v. Thigpen*, 805 F.2d 506, 516 (5th Cir. 1986).

Finally, petitioner contends that the October 26 confession was involuntary because it was taken as part of

a prosecutorial drive for the death penalty. Even if that allegation, though factually unsupported in the record, were true, an improper prosecutorial motivation alone would be insufficient to vitiate the voluntariness of petitioner's consent, but would merely be a factor to be considered when evaluating the impact of the totality of the circumstances on petitioner's exercise of free will. See *Jurek*, 623 F.2d at 941, n.7 (the totality of factors relevant to the disposition of *Jurek* case).

In this case, the Court finds the existence of a second confession to be of minimal probative value on the issue of voluntariness. First, the undisputed evidence is that the second confession was taken by Ranger Cook without having read petitioner's initial confession and with minimal briefing from District Attorney Price. Price testified that he did not suggest specific areas of interrogation for Cook to develop. Second, the testimony was not controverted that the confession of October 26 was taken to develop the case factually with new information. Third, as distinguished from *Jurek*, the initial confession in this case was sufficient to allow prosecutors to seek the death penalty. This case differs vastly from *Jurek*, *supra*, where prosecutors acted essentially on a prosecutorial "hunch" to take another confession and extract statements that would turn a murder case into a capital murder case. Fourth, there is fair support in the record that petitioner was mentally capable of making the statements. 28 U.S.C. § 2254(d)(8). Finally, there is no evidence in this record to raise the issue that prosecutors relied upon petitioner's suggestibility by pursuing a specific object during their interrogation and relenting only when they attained a confession to capital murder. Evidence of this character would be probative of official overreaching designed to overbear petitioner's free will and probative of involuntariness. But, other than petitioner's conclusory allegations of prosecutorial misconduct, there is no such evidence in the record and none before this Court. The absence of improper motivation by officers

supports this Court's conclusion that under the totality of the circumstances these confessions cannot be deemed involuntary. Petitioner's argument to the contrary are not persuasive.

IV. JURY VOIR DIRE

Petitioner argues that his jury was conviction prone because seven of the state's challenges for cause were granted by the Court, thus excluding people opposed to the death penalty. The former *Witherspoon* rule allowed trial courts to excuse jurors so opposed to the death penalty that they would automatically vote against such a sentence. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). This rule was modified by the Supreme Court in 1985. See *Wainwright v. Witt*, 105 S.Ct. 844 (1985). Before constitutionally excusing jurors challenged for cause on *Witherspoon* grounds, trial courts must be satisfied that the prospective juror's views concerning capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 852. A trial court's granting of a challenge for cause on this ground is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Darden v. Wainwright*, 106 S.Ct. 2464, 2469 (1986) (citing *Witt*).

Petitioner concedes that six of the seven jurors excused for cause in this case admitted they could not vote for the death sentence, meaning they qualified for exclusion even under the narrower *Witherspoon* test. See R. Vol. 7 at 200-215 (Edna R. Williams); Vol. 9 at 488-499 (Priscilla Smith); Vol. 9 at 587-595 (Mrs. Buford Mills); Vol. 11 at 970-976 (Battie Deason); Vol. 11 at 997-1000 (Billie Jones); and Vol. 11 at 1050-1071 (Ernestine Lee). The seventh was excused after testifying that he would be unable to answer a question asking about petitioner's future behavior, since no one can say what a person might do in the future. See R. Vol. 11 at 888-913, 897 (Elmer Thompson). This is one of the three ques-

tions jurors must answer during the sentencing phase of a capital case in Texas.

Neither *Witherspoon* nor *Witt* seem to apply to Elmer Thompson because he was not excused because of his views on capital punishment, but because of his views on the uncertain nature of the future. By the same token, petitioner is unable to demonstrate any error which resulted from Elmer Thompson's dismissal, other than a possible argument that the jury was made more conviction prone in his absence, and in the absence of the other six excused jurors.

The conviction prone theory has been squarely rejected by the Supreme Court, however. *Lockhart v. McCree*, 106 S.Ct. 1758 (1986). The sixth amendment guarantees defendants a right to a jury that will "conscientiously apply the law and finds the facts." *Id.* at 1767, citing *Witt*, 105 S.Ct. at 852. As long as this requirement is met, the state may "death qualify" juries in capital cases according to the standard set out in *Witt*. *Welcome v. Blackburn*, 793 F.2d 672 (5th Cir. 1986).

Even assuming petitioner's conviction prone jury argument had not been rejected, no error exists. Petitioner failed to object to the challenges for cause at trial, and has failed to show cause for his failure and prejudice resulting from the trial court's action. *Engle v. Issac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 86-7 (1977). In addition, the state had six peremptory challenges which it did not use, meaning only one of the seven jurors need have been excused properly. In fact, all were properly excused, and petitioner's challenge to the jury fails to state an adequate ground for relief. This contention is therefore DENIED.

V. ALLEGED TRIAL ERRORS

Petitioner raises two grounds for relief related to activities at his trial. First, he alleges that the trial court's failure to sua sponte order a Computerized Axial Tomog-

raphy (CAT) Scan of petitioner's brain constituted a denial of equal protection. Second, he asserts that the trial court should have declared a mistrial when, during the punishment phase, a witness called to testify concerning a prior rape attempt failed to identify petitioner as the culprit.

The first allegation presents a novel argument. A psychiatrist called by petitioner on the issue of insanity testified that a CAT Scan would enable a doctor to determine whether petitioner had suffered any organic brain damage as a child which resulted in retardation. R. Vol. 16 at 2201. It is undisputed that defense counsel made no request for these tests to be performed. Petitioner cites authority for the proposition that competency to stand trial is a continuing issue, and insanity should be treated in the same manner. See *Pride v. Estelle*, 649 F.2d 324 (5th Cir. 1981). Petitioner concludes that it was incumbent upon the trial court to order further tests which would have helped decide the issue of petitioner's sanity, and his failure to do so constituted unlawful differential treatment of potentially insane defendants as opposed to potentially incompetent defendants.

The *Pride* case does not address the duties of trial courts to order testing on their own motion, however. Rather, it requires a federal habeas petitioner to prove by clear and convincing evidence facts which positively, unequivocally and clearly generate a real, substantial and legitimate doubt concerning petitioner's competency to stand trial. *Id.* at 326; *Johnson v. Estelle*, 704 F.2d 232, 237-8 (5th Cir. 1983). Assuming petitioner is correct in asserting that this standard should be applied equally to insanity defenses, the burden has not been satisfied.

The record reflects a lengthy competency hearing and subsequent trial. The issue of insanity was raised at both. A jury heard extensive testimony from both sides concerning the possibility of organic brain damage. The jury rejected it as a factor precluding competency to

stand trial, and later rejected it as a factor supporting an insanity defense. After examining the record, this Court believes these conclusions are fairly supported and as such should not be disturbed. *Maggio v. Fulford*, 462 U.S. 111, 117 (1983).

As a practical matter, imposing a burden upon a trial court to order testing based on a mere mention by a witness, without more, would create intolerable and unwieldy delays. This is especially true in light of all the facts in this case. For example, there was testimony from a psychologist indicating that brain scans were still in a developmental state at the time of this trial. R. Vol. 7 at 802. Testimony at the competency hearing from a clinical psychologist called on petitioner's behalf indicated that any brain damage petitioner may have suffered took the form of underdevelopment, and could not be detected by any test, including a brain scan. R. Vol. 6 at 589-590. In this case, the trial judge had no duty to order on his own motion an unproven and probably ineffective test which would have added nothing to the issue of petitioner's sanity.

Even assuming the strict *Pride* standard is inapplicable to proof of an insanity defense, this Court can intervene only if the State failed to provide petitioner "access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 105 S.Ct. 1087, 1094 (1985). In applying this standard, *Ake* required the appointment of a psychiatrist to assist in the preparation of a potential insanity defense. Ample professional assistance, including a psychiatrist, was provided to this petitioner. Given the multitude of tests performed over a period of years and prior to the trial, and the number of doctors who have examined petitioner, this Court is wholly unpersuaded that the failure to perform an unrequested CAT Scan deprived petitioner of the essential tools with which to build his defense.

Petitioner's second complaint in this category concerns the testimony of Julia Armitage, the victim of an attempted rape in 1976. Petitioner contends that since she could not positively identify him as her assailant, her testimony during the punishment phase was so prejudicial that it constituted fundamental error.² Petitioner apparently advances this argument in order to circumvent the Texas Court of Criminal Appeals' refusal to consider this point because the error was not properly preserved. See *Penry*, 691 S.W.2d 649-650.

Use of the fundamental error standard has been significantly restricted, however, and is available only in exceptional circumstances when necessary to avoid a miscarriage of justice. See, e.g., *United States v. Frady*, 456 U.S. 152, 163 (1972). For this reason, the fundamental error standard is inappropriate on collateral review of a criminal conviction which has been affirmed on direct appeal. *Id.* at 164. Petitioner must meet an even higher standard, which he has not done on this point.

Since resort to a fundamental error standard is not possible, this Court is left with the state court's finding that error was not properly preserved. Federal courts do not sit to review interpretations of state criminal law by the state's highest court. *Seaton v. Procunier*, 750 F.2d 366, 368 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 110 (1986). It is not this Court's function to disagree with the Court of Criminal Appeals and hold that error was properly preserved.

The effect of this is to change the standard to be used in resolving petitioner's claim. Since the state courts have determined that the manner of objection was insufficient, petitioner must show cause for the insuffi-

² Petitioner cites *U.S. v. Garber*, 471 F.2d 212, 217 (5th Cir. 1972) to support his argument that no request for instruction was necessary in this case. *Garber* applied this standard, however, only in the fundamental or plain error as contemplated by Rule 52(b) of the Fed. Rules of Cr. Procedure.

ciency and prejudice from Armitage's testimony. *Engle*, 456 U.S. at 107.

No explanation is offered to show cause. By the same token, it is unlikely that any prejudice resulted. A confession from petitioner describing a rape attempt similar in many respects to Armitage's ordeal was admitted after her testimony. R. Vol. 17 at 2640-41. Petitioner's trial counsel made it very clear to the jury when cross-examining Armitage that she could not positively identify petitioner as her assailant. R. Vol. 17 at 2616, 2617. The jury therefore knew Penry may or may not have been the assailant, but also knew Penry had been the assailant in a similar crime at the same time in the same area. Finally, the Armitage testimony was only a small part of the proceedings during the punishment phase of petitioner's trial. Given all these factors, it is extremely unlikely that Armitage's testimony played a decisive role in the proceedings, meaning it could not have infected the entire trial with "error of constitutional dimensions" nor could refusal to consider it result in a "fundamental miscarriage of justice." *Frady*, 456 U.S. at 170, 172. Both grounds for relief asserted by petitioner based on alleged trial error will be overruled.

VI. PUNISHMENT PHASE JURY CHARGE

Petitioner next contends that his sentence constitutes cruel and unusual punishment because of the trial court's failure to instruct the jury on how to weigh mitigating factors when answering the three issues submitted to them at the punishment phase of a capital case. See Tex. Code Crim. Proc. art. 37.071(b)(1)-(3) (Vernon Supp. 1986) (Pet. No. 8). Petitioner advances the same argument with regard to the trial court's refusal to define "deliberately" as used in the first of these three issues. (Pet. No. 9).

Both arguments have been "squarely foreclosed." *Evans v. McCotter*, 790 F.2d 1232, 1243 (5th Cir. 1986). Texas

trial courts need not specifically instruct jurors on how to balance mitigating and aggravating circumstances. *Esquivel v. McCotter*, 777 F.2d 956, 958 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1662 (1986); *citing Zant v. Stephens*, 462 U.S. 862 (1983). By the same token, Texas trial courts need not define the term "deliberately" as used in the punishment phase charge. *Cannon v. State*, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 897 (1986); *Russell v. State*, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983), *cert. denied*, 104 S.Ct. 1428 (1984). In lieu of instructions, juries are allowed to use the common meanings attributed to words in the charge. Both prosecution and defense are free to argue the inferences they wish the jury to draw from the words used. *See, e.g., Milton v. Procunier*, 744 F.2d 1091, 1086 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 2040 (1985). These two grounds of error will also be overruled.

CONCLUSION

The criminal courts of the State of Texas have convicted Johnny Paul Penry of capital murder and sentenced him to death. The duty of this federal court undertaking collateral review of those decisions is to correct errors of constitutional magnitude, whether transgressions of enumerated rights or acts repugnant to fundamental principles of fairness and justness protected by the Due Process Clause of the fourteenth amendment. Ever mindful of that duty, petitioner's grounds for relief have been fully considered by the Court and, for the reasons stated above, rejected. It is therefore

ORDERED that Petitioner's First Amended Application for Writ of Habeas Corpus be, in all respects, DENIED. It is further

ORDERED that the Stay of Execution imposed by this Court on May 6, 1986, pending review of the petitioner's application is hereby DISSOLVED.

SIGNED this 28th day of April, 1987.

/s/ William W. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

(Title Omitted in Printing)

JUDGMENT

On the 28th day of April, 1987, came on to be heard Respondent's Supplemental Motion for Summary Judgment, and the Court after considering the pleadings, evidence and the record filed herein, is of the opinion that judgment should enter for Respondent for the reasons set forth in the Court's order of that date. It is, therefore,

ORDERED, ADJUDGED and DECREED that Respondent's Supplemental Motion for Summary Judgment be, and it is hereby GRANTED. Petitioner's Application for Writ of Habeas Corpus is in all things DENIED.

This is a FINAL JUDGMENT.

SIGNED this 8th day of May, 1987.

/s/ William M. Steger
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

(Title Omitted in Printing)

CERTIFICATE AS TO PROBABLE CAUSE

A notice of appeal having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by a state court, the court, considering the record in the case and the requirement of FRAP 22(b), hereby finds that:

Part A

- ☒ there is probable cause for an appeal.
[] a certificate of probable cause should not issue.
(reasons below)

Part B

(for non-CJA pauper cases only)

- ☒ the party appealing is entitled to proceed in forma pauperis.
[] the party appealing is not entitled to proceed in forma pauperis. (reasons below)

REASONS FOR DENIAL:

Date: May 8, 1987

/s/ William M. Steger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

(Title Omitted in Printing)

DEPOSITION ON WRITTEN QUESTIONS

1. State your name, occupation, the organization you work for and educational background.

ANSWER: My name is Alexander Peter Evans, I'm a pollster. I work for Cambridge Survey Research. I have a Bachelors in Political Science from the University of California, Berkeley and I'm working towards a Masters in Public Policy at the University of Michigan Ann Arbor.

2. What type of business is the organization you work for engaged in?

ANSWER: Survey Research.

3. How long have you been employed by the organization you work for?

ANSWER: Two and a half years.

4. Did the organization you work for (i.e. Cambridge Survey Research) make the Public Opinion survey, the results of which are attached and if so what role did you play in making the survey?

ANSWER: Yes, we did make the survey. I participated in all aspects of the research project from sampling design, questioner design, and analysis, and report writing.

5. How were the participants in the survey selected, how many people were contacted and of those contacted how many responded?

ANSWER: We use a stratified random quota sample where we use a random digit dialing for the sample and the participants were selected randomly with quotas establish for county, for region, and for sex within those approximately 500 people responded to the survey and it was all conducted by telephone.

- QUESTION: How many people did you say were contacted?

ANSWER: Approximately 5000.

6. Does the organization you work for specialize in a particular type of public opinion survey or does it perform a broad range of surveys? If it specializes in a particular type of survey what type does it specialize in?

ANSWER: The answer is we do a broad range of surveys but we specialize in political research.

7. Approximately how many surveys per year does the organization you work for perform?

ANSWER: About 200.

8. Have the individual responses to your survey been destroyed and if not where are they being stored?

ANSWER: They have not been destroyed. They are being stored in Washington in our storage room.

9. How many years experience do you have in making public opinion surveys?

ANSWER: I have about two and a half years and Cambridge Survey Research has about fifteen years.

10. In your opinion are the results of the attached survey a valid measure of the attitude towards the death penalty in Florida?

ANSWER: Yes.

/s/ Alex Evans
ALEX EVANS

On the 10 day of October, 1986, I the undersigned notary public, placed the Deponent, Alex Evans, under oath and asked him the foregoing questions and recorded the answers he gave. After recording the answers I had the Deponent read the answers and make any corrections he deemed needed. After having read the answers and making corrections Deponent was asked if under penalty of perjury the answers were true and correct. After Deponent responded that the answers were true and correct Deponent affixed his signature in my presence. To certify the above witness my hand and seal of office this 28 day of October, 1986.

/s/ Jan Massengale
Notary Public in and for the
District of Columbia
My Commission Expires March 31, 1990

ATTACHMENT TO DEPOSITION ON WRITTEN QUESTIONS MEMBER OF A JURY

Now, I know it is hard in a survey like this, but just for a moment I'd like you to imagine you are a member of a jury. The jury has found the defendant guilty beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. How would you feel about recommending the death penalty if:

	Favor	Oppose	Don't Know
The convicted person had committed a series of murders?	88%	7%	5%
The convicted person had opened fire on a restaurant full of people?	83	9	8
A police officer was killed in the line of duty?	72	13	15
If the convicted person was on drugs or had been drunk at the time of the murder?	57	28	15
If this was the convicted person's first violent offense?	52	32	17
If this was the convicted person's first offense of any kind?	43	38	20
If the murderer was under the age of 18 years old?	35	42	23
If the murder was committed in a moment of rage against a family member or friend and was not planned or calculated?	34	50	16
If the convicted person was mentally unbalanced at the time of the murder or had a history of mental illness?	28	54	18
If the convicted person was mentally retarded?	12	71	17

[AAMD RESOLUTION ON CAPITAL PUNISHMENT]

- During the Council Meeting a resolution on capital punishment was endorsed unanimously by the Council. It reads as follows:

"The imposition of capital punishment on individuals with mental retardation raises troubling legal and moral issues. The AAMD supports legal reforms in the States that comport with the standard of civilized Common Law nations."

AAMD COMMUNIQUE

American Association
on Mental Deficiency
1719 Kalorama Road, N.W.
Washington, D.C. 20009
(202) 387-1968

For Release: Immediately

Contact: Curt Decker,
Information Specialist
(800) 424-3688

The American Association on Mental Deficiency denounces the execution of an individual with mental retardation. Jerome Bowden, by the state of Georgia on June 24, 1986.

(AAMD is the nation's oldest and largest interdisciplinary professional organization in the field of mental retardation. AAMD was founded in 1876, and now has nearly 10,000 members in such disciplines as education, medicine, psychology, social work, religion.)

The execution of any mentally retarded person raises serious question of fairness in the criminal justice system. AAMD opposes the execution of any person who is currently incompetent because of mental retardation.

The Bowden execution is particularly outrageous. Serious questions had been raised about his current competence. In response to public outcry, the Georgia board of pardons and paroles had suspended the execution, supposedly to evaluate the defendant's current competence. After the hasty administration of a single I.Q. test, they claimed that he was competent and reinstated his death sentence immediately. He was put to death the next morning.

The procedures Georgia used for evaluating current mental condition do not meet modern professional stand-

ards. No single I.Q. test is adequate to ascertain any mentally retarded person's current mental condition, particularly for an issue as important as the death penalty.

AAMD calls upon all states to oppose the practice of executing mentally incompetent people who have mental retardation. AAMD also calls upon all branches of government to re-evaluate the procedures for evaluating the current mental condition of convicts on death row.

The barbaric spectacle of executing a currently incompetent mentally retarded person must be prevented.

TABLE 9

SHOULD RETARDED BE SUBJECT TO DEATH?
(Question #31)

	N	%
No Death Penalty for Retarded	583	66%
Yes Death Penalty for Retarded	151	17%
Depends How Retarded *	144	16%
Don't Know/Missing	39	—

* A volunteered response only.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2466

JOHNNY PAUL PENRY,
Petitioner-Appellant,
v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Nov. 25, 1987

Rehearing and Rehearing En Banc
Denied Dec. 23, 1987

Before REAVLEY and GARWOOD, Circuit Judges.*

REAVLEY, Circuit Judge:

This is a collateral attack upon the death sentence by a Texas court of Johnny Paul Penry. With one exception all of the contentions advanced on Penry's behalf are easily rejected. The exceptional contention is that Texas law did not permit the jury to consider, and to apply, all of Penry's personal mitigating circumstances prior to

* Due to his death on October 19, 1987, Judge Robert M. Hill did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

reaching the verdict that mandated his death sentence. We are bound by superior authority to reject that contention, but we discuss the problem fully to demonstrate why it may merit further consideration.

I.

On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped, and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, but she was able to relay a description of her assailant to the first police officer on the scene and to the doctor in the hospital.

The description led two local sheriff's deputies to suspect Penry. They went to the house of Penry's father, where Penry was staying. Penry denied any involvement but voluntarily agreed to go with the officers to the police station.

At the police station the officers and Penry were met by a number of other local law enforcement agents. They read Penry his *Miranda* rights and questioned him about a wound on his back. After being warned again, Penry signed a consent to search form. Everybody then went back to the Penry home to retrieve a shirt he had worn earlier that day.

Penry then accompanied the police officers to the scene of the crime. There Penry, for the first time, stated that he had "done it." He was immediately arrested, handcuffed, and read his rights again. He was brought back to the police station and taken before a magistrate. Penry was formally charged with capital murder. The magistrate read and questioned Penry about whether he understood his rights. Penry stated that he understood his rights and signed the warning forms.

Police Chief Bill Smith then questioned Penry after again warning him. Penry agreed to give a statement. Smith took the statement in notes and turned it over to

his secretary to type. After the statement was typed, because Penry could not read, it was read to him in front of two non-police witnesses. That statement described the crime in detail, and Penry signed it.

Texas Ranger Cook took a second statement the following day. Again, the statement was read back to Penry in front of two non-police witnesses, and it contained the *Miranda* warnings and a statement that the rights were being waived. The second statement told of the crime in even more detail and contained confessions of Penry's previous crimes.

These two statements formed the heart of the prosecution against Penry. The statements were consistent with the other evidence, including proof that Penry had been at Ms. Carpenter's house once before, Ms. Carpenter's statement about being raped and stabbed, the bloody scissors found at the scene, and the position of the victim's clothing as described by the ambulance attendant. However, there was no physical evidence (blood, semen, fingerprints or hair samples) linking Penry to the scene of the crime.

At a competency hearing before trial, Penry was shown to have limited mental ability. He could not read or write, having never finished the first grade. His IQ indicated mild to moderate retardation. He had been in and out of a number of state schools. His relatives testified that he was beaten as a child and had behaved strangely as both a child and a teenager. Nevertheless, a jury found him competent to stand trial.

At the guilt/innocence phase of his trial, evidence of Penry's limited mental capacity was reintroduced. There was disagreement among the three testifying psychiatrists whether Penry was insane: the defense psychiatrist opined that he was, but the state's two psychiatrists disagreed. There was also disagreement over the degree of Penry's mental limitation and the cause of the limitations. However, all of the psychiatrists agreed that Penry had

mental limitations, whether caused by a birth trauma or by childhood environmental factors such as beatings and being locked in his room for extended periods of time. They also agreed that Penry's problems manifested themselves, among other ways, in an inability to learn from his mistakes.

The jury rejected Penry's insanity defense and found him guilty of capital murder. Tex.Penal Code Ann. § 19.03 (Vernon 1974). The jury then answered "yes" to all three "special issues," and Penry was sentenced to death. Tex.Crim.Proc.Code Ann. art 37.071 (Vernon 1981 & Supp.1987). The Texas Court of Criminal Appeals affirmed the conviction and sentence. *Penry v. State*, 691 S.W.2d 636 (Tex.Crim.App.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.805 (1986).

II.

Penry argues that it would be cruel and unusual punishment to execute a mentally retarded person such as himself. He cites *Ford v. Wainwright*, 477 U.S. 399, —, 106 S.Ct. 2595, 2600, 91 L.Ed.2d 335 (1986), for the proposition that "idiots and lunatics are not chargeable for their own acts." An identical claim has recently been rejected by this court. *Brogdon v. Butler*, 824 F.2d 338, 341 (5th Cir.1987). Penry's claim is without merit.

Penry raises a number of issues regarding his two confessions. He first claims that they should have been suppressed because they were the fruit of an illegal arrest. A Fourth Amendment claim of illegal arrest is foreclosed in habeas if the state "provided an opportunity for full and fair litigation" of the claim. *Stone v. Powell*, 428 U.S. 465, 493-95, 96 S.Ct. 3037, 3052-53, 49 L.Ed.2d 1067 (1976). Recognizing the *Stone* bar, Penry argues that he did not have a "full and fair" suppression hearing. He claims that the state limited his investigator's fees, that a police officer who testified at both the suppression hearing and trial lied at the suppression hearing, and that the state failed to provide him with one of his previ-

ous confessions. Penry's claims are without merit. Penry does not point out what difference more investigator's fees, or having his previous confession, would have made. The police officer's testimony at the suppression hearing was not inconsistent with his trial testimony. We have made an "independent evaluation of the state court record" and are satisfied that Penry's "opportunity to contest the introduction of incriminating evidence resulted from his arrest was not circumscribed." *Billiot v. Maggio*, 694 F.2d 98, 100 (5th Cir.1982). *Stone* bars relitigation of the issue here.

Penry also argues that his confession was involuntary and that he did not voluntarily waive his *Miranda* rights. Most of Penry's argument on both issues centers on his low intellect and inability to freely confess or waive his rights. However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, —, U.S. —, —, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). Similarly, *Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Connelly*, 107 S.Ct. at 524. We have carefully examined the record, as is our duty, see *Miller v. Fenton*, 474 U.S. 104, 506 S.Ct. 445, 88 L.Ed.2d 405 (1985) (ultimate question of voluntariness of confession subject to plenary review by federal habeas court), and can find no evidence of police misconduct that would taint the confessions or waiver of rights. Both the confession and waiver of *Miranda* rights were voluntary.

Penry also challenges the exclusion of one venireman for cause. Citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the state argues that Penry procedurally defaulted on the issue. When the state court opinion is silent as to whether it used the procedural bar,

this Court will consider "whether the state court has used procedural default in similar cases to preclude review of the claim's merits, whether the history of the case would suggest that the state court was aware of the procedural default, and whether the state court's opinions suggest reliance upon procedural grounds or a determination of the merits."

Ortega v. McCotter, 808 F.2d 406, 408 (5th Cir.1987) (quoting *Preston v. Maggio*, 705 F.2d 113, 116 (5th Cir.1983)). In the state habeas claim here, the only time that issue was raised, the state court simply denied the writ without an opinion. However, Texas has consistently applied a procedural bar to exclusion of veniremen without objection. *Hawkins v. State*, 660 S.W.2d 65, 82 (Tex.Crim.App.1983). Similarly, the state court was aware of the procedural bar in this case since the state raised the bar in its reply to Penry's state habeas claim. Therefore, under the *Preston* test, the claim is barred if Penry failed to object to the exclusion at trial.

At trial, Penry's counsel originally objected to the state's motion to exclude the venireman for cause. However, after a number of attempts at rehabilitation, counsel withdrew his objection and the challenge for cause was granted. Penry argues that the attorney's argument was not "an expressed withdrawal of the objection but a statement of resignation to the fact that the Court was going to grant the State's challenge for cause in spite of the objection." We disagree. Our reading of that part of the voir dire convinces us that counsel did expressly withdraw his objection. He did so "regretfully" because he wanted the juror but knew that the juror could not be rehabilitated. The *Sykes* bar precludes our consideration of the merits of the issue.

III.

A.

The jury rejected Penry's insanity defense and found him guilty of capital murder.¹ The Texas bifurcated statutory scheme then provides for the jury to decide the sentence by answering three "Special Issues":

¹ At the time of Penry's offense, section 19.03 of the Texas Penal Code Ann. (Vernon 1974) provided:

(a) A person commits an offense [of capital murder] if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

"Penry was found guilty of a violation of subsection (a)(2), "in the course of committing and attempting to commit the offense of aggravated rape." *Penry v. State*, 691 S.W.2d at 641.

Subsequent amendments have changed "aggravated rape" to "aggravated sexual assault" and have added;

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

Texas Penal Code Ann. § 19.03 (Vernon Supp. 1987).

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Crim.Proc.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). If the jury unanimously answers "yes" to all three questions, the court must sentence the defendant to death. Tex.Crim.Proc.Code Ann. art. 37.071(c)-(e) (Vernon 1981 & Supp.1987). Otherwise, the defendant must be sentenced to life imprisonment. *Id.* Here, additional evidence was introduced in the sentencing phase. The jury was then instructed, *inter alia*:

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

The jury instructions then proceeded to list, without definition, the three special issues with names of the defendant and decedent inserted.

Penry objected to the jury charge. He complained that the court failed to define "deliberately," "probability," "criminal acts of violence" and "continuing threat to society." He also objected that the court failed to

instruct the jury to weigh aggravating and mitigating circumstances and failed to authorize a discretionary grant of mercy based on the existence of mitigating circumstances.

The objections were overruled and the jury answered "yes" to all three special issues. Penry was sentenced to death. On direct appeal, the Texas Court of Criminal Appeals rejected Penry's objections to the jury charge. *Penry v. State*, 691 S.W.2d at 653-54. The court held that the words used in the special issues need not be defined because the jury could understand the words' common meaning. *Id.* With respect to Penry's argument on weighing of aggravating/mitigating circumstances, the court stated that

it has in effect been answered by the Supreme Court's opinion in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upholding this State's statutory scheme for imposing capital murder. Our statutory scheme allows for broad consideration of aggravating and mitigating factors. V.T.C.A. Penal Code, Sec. 19.03 ensures that imposition of the death sentence is not even a possibility if certain aggravating circumstances are not proven beyond a reasonable doubt by the State.

Defendants are allowed to present all possible relevant mitigating information at the punishment hearing, as part of the effort to aid the jury in answering the special issues.

Defense counsel is allowed to argue against the death penalty in general, or its imposition in the particular case at hand in light of all relevant mitigating factors. In sum, the Texas death penalty scheme passes constitutional muster despite failure to require the jury to find that aggravating factors outweigh mitigating ones.

Id. at 654.

The jury was allowed to hear all evidence that might mitigate the culpability of Penry's deeds or his person. The jury could then consider (i.e. *think about*) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether Johnny Paul Penry should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more. The court, following Texas law, ends the matter and orders death. It is difficult to see how this procedure accords with some of the Supreme Court's writings on the Eighth Amendment's mandate of individualized application of all mitigation along with aggravation in the sentencing decision. In order to explain our concern, we must look further at the Supreme Court's writings on capital punishment.

B.

The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), laid the foundations for the post-*Furman*² era of capital punishment. The plurality³ in *Gregg* held that the Georgia

² *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* effectively struck down all capital punishment statutes in place at that time.

³ Only three members of the Court, Justices Stewart, Powell and Stevens, were in the majority in *Gregg* as well as the four other death penalty cases decided that day. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Those opinions, as confirmed by subsequent decisions, represent the law involved.

capital punishment statute was constitutional. 428 U.S. at 207, 96 S.Ct. at 2941. That statute provided for a bifurcated trial with the guilt/innocence phase followed by a punishment stage. *Id.* at 195, 96 S.Ct. at 2935. At the punishment stage, the jury had to find at least one aggravating circumstance before it could impose the death penalty. *Id.* at 197, 96 S.Ct. at 2936. Additionally, at the punishment phase, the jury could consider any other aggravating or any mitigating circumstances before imposing either death or life imprisonment. *Id.*

Although the Court warned that "each district system must be examined on an individual basis," *id.* at 195, 96 S.Ct. at 2935, two basic principles stand out. First, in order to pass constitutional muster, the sentencer's⁴ discretion must be narrowed. That can be accomplished by the finding of aggravating circumstances either about the crime or the defendant involved. Second, the sentencer must consider the circumstances and the defendant involved. That is usually done through consideration of mitigating circumstances.

The other four cases decided on the same day as *Gregg* all involved application of the two basic principles. In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the Court struck down a North Carolina law that mandated the death penalty for "a broad category of homicidal offenses." 428 U.S. at 287, 96 S.Ct. at 2983. The Court found that one of the statute's "constitutional shortcoming[s]" was that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303, 96 S.Ct. at 2991. Likewise, the Louisiana mandatory death penalty, even though it was considerably narrower than North Carolina's and provided

⁴ The sentencer may be a judge instead of a jury. See discussion concerning *Proffitt*, *infra* p. 921.

for jury instruction on lesser included offenses even if not warranted by the evidence, was, for similar reasons, found to be unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325, 332, 335-36, 96 S.Ct. 3001, 3005, 3007, 49 L.Ed. 2d 974 (1976).

The Florida statute was considered by the Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976). That statute, similar to Georgia's, required the sentencer (the judge with an advisory jury) to weigh eight enumerated aggravating circumstances against seven enumerated mitigating circumstances. *Id.* at 251, 96 S.Ct. at 2966. The Court found the statute constitutional since the aggravating factors serve to narrow the focus on the crime and the mitigating factors force the sentencer to "focus on the individual circumstances of each homicide and each defendant." *Id.* at 252, 96 S.Ct. at 2966.

The Court, on the same day as *Gregg*, *Proffitt*, *Roberts*, and *Woodson*, considered the Texas statute at issue here. The Court first held that the Texas definition of capital murder in § 19.03 was the equivalent of finding "a statutory aggravating circumstance before the death penalty may be imposed." *Jurek v. Texas*, 428 U.S. 262, 270, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976). The Court then addressed the issue of mitigating circumstances:

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson v. North Carolina* to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts v. Louisiana*. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg v. Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors, and in *Proffitt v. Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also

consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. 522 S.W.2d at 939-940.

Id. at 271-73, 96 S.Ct. at 2956-57 (citations and footnotes omitted). The Court then concluded:

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

Id. at 273-74, 96 S.Ct. at 2957 (footnotes omitted).

We have no doubt that the Texas statute sufficiently narrows the circumstances in which death is imposed. Instead, we are concerned with *Gregg's* second part; the individual consideration of the circumstances of the crime and the character of the individual. That law has not been stagnant since *Gregg*. The Supreme Court has developed what is meant by individualized consideration.

Two years after *Gregg*, the Court considered an Ohio capital punishment statute that required the death penalty unless one of three narrowly drawn mitigating circumstances was present. *Lockett v. Ohio*, 438 U.S. 586, 593-94, 98 S.Ct. 2954, 2959, 57 L.Ed.2d 973 (1978). The Court found the statute unconstitutional, holding

that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from con-

sidering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604, 98 S.Ct. at 2964-65 (emphasis in original).

In *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982), the defendant, 16 years old at the time of the murder, offered evidence of his troubling family background and his emotional disturbance. In sentencing Eddings to death, the trial judge stated that "in following the law, he could not 'consider the fact of this young man's violent background.'" *Id.* at 112-13, 102 S.Ct. at 876. The Court found that the sentencing violated the rule in *Lockett*:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-15, 102 S.Ct. at 876-77 (footnotes omitted).

After *Eddings*, the Court has made clear that the range of mitigating factors that must be considered is very wide. For example, in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) the Court reversed a death sentence because the trial court refused to allow evidence of Skipper's good adjustment to prison. Since that relevant mitigating evidence was excluded the Court reversed on *Eddings* grounds. *Skipper*, 476 U.S. at —, 106 S. Ct. at 1673.

The most recent Supreme Court case to look at mitigating evidence was *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In that case, the defendant Hitchcock introduced evidence of consequences of his childhood habit of inhaling gas fumes, together with other misfortunes of his youth. *Hitchcock*, 107 S.Ct. at 1823-24. The court of appeals affirmed the denial of habeas relief holding that the presentation of the evidence and Hitchcock's attorney's argument to "consider the whole picture, the whole ball of wax," was sufficient to show that he had "an individualized sentencing hearing." *Hitchcock v. Wainwright*, 770 F.2d 1514, 1518 (11th Cir.1985) (en banc), *rev'd sub nom.*, *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). A unanimous Supreme Court reversed. *Hitchcock*, 107 S.Ct. at 1821. Instead of looking to what evidence was presented to the jury and the argument of defense counsel, the Court focused on the jury instructions and the prosecutor's argument. *Id.* at 1823-24. The Florida statute at the time of trial provided for consideration of certain enumerated aggravating circumstances and certain enumerated mitigating circumstances. *Id.* at 1822-23. Although there was some doubt whether the Florida statute prohibited the use of nonstatutory mitigating circumstances, the court did not address the issue "[b]ecause our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly" *Id.* at 1823. The Court focused on both the prosecutor's argument and the jury instructions. The prosecutor told the jury "to consider the mitigating circumstances and consider those by number," and he went down the list item by item. *Id.* at 1824. The trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following" and then listed the statutory mitigating circumstances. *Id.* at 1824. The Court concluded: "[w]e think it could not be clearer that the advisory jury was

instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, *Eddings v. Oklahoma*, and *Lockett v. Ohio*." *Id.* (citations omitted).

It is therefore abundantly clear that a sentencing authority must not be precluded from considering any, or almost any, mitigating evidence. The issue here is what the term "consider" means. The Supreme Court has held that presentation of mitigating circumstances to the sentencing authority is not enough: "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen' to that evidence." *Sumner v. Shuman*, — U.S. —, —, 107 S.Ct. 2716, 2722, 97 L.Ed.2d 56 (1987) (quoting *Eddings*, 455 U.S. at 115, n. 10, 102 S.Ct. at 877, n. 10). We read the Court's command that the sentencer not be precluded from "considering" any mitigating circumstances to mean that the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. See *Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44, 77 L.Ed.2d 235 (1983). It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision.

The Supreme Court, in effect, has approached capital cases from two different ends. First, "a State must 'narrow the class of murderers subject to capital punishment,' by providing 'specific and detailed guidance' to the sentencer." *McCleskey v. Kemp*, — U.S. —, —, 107 S.Ct. 1756, 1772-73, 95 L.Ed.2d 262 (1987) (citations omitted) (citing *Gregg*, 428 U.S. at 196, 96 S.Ct. at 2936 and *Proffitt*, 428 U.S. at 253, 96 S.Ct. at 2967). On the

other side, "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." *McCleskey*, 107 S.Ct. at 1773; see also *Shuman*, 107 S.Ct. at 2723 (Eighth Amendment violated by statute that requires the death sentence for defendant who murders while serving a life sentence without the possibility of parole); see generally *California v. Brown*, — U.S. —, —, 107 S.Ct. 837, 841-42, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring) (discussing the "tension" between "the two central principles of our Eighth Amendment jurisprudence").

Turning back to the Texas sentencing procedure, we see that the jury is to respond to three "special issues." The third issue involves provocation by the deceased. Tex.Crim.Proc.Code Ann. art. 37.071(b). It rarely enters into the decision of the jury. Instead, the focus is on the first two questions: whether the killing was deliberate with the reasonable expectation that death would follow and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Crim.Proc.Code Ann. art. 37.071(b). The Texas Court of Criminal Appeals has consistently held that the words of these special issues have clear meanings that need no definition. *Penry*, 691 S.W.2d at 653-54. The jury is instructed, as here, that in answering "each Special Issue you may take into consideration all of the evidence. . . ." No jury instruction on mitigating evidence is necessary because "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." *Cordova v. State*, 733 S.W.2d 175, 190 (Tex.Crim.App. 1987) (quoting *Quinones v. States*, 592 S.W.2d 933, 947 (Tex.Crim.App.), cert. denied, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980)).

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the

mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory.⁵ The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to *decline to impose* the death penalty"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

We recognize that *Jurek* specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme

⁵ Commentators have expressed similar views. See Benson, *Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity*, 23 S.Tex.L.J. 315 (1982); Green, *Capital Punishment, Psychiatric Experts, and Predictions of Dangerousness*, 13 Capital U.L.Rev. 533 (1984). Green argues that once the prosecutor's psychiatrist pronounces a defendant a sociopath, as usually happens, the answer to the future dangerousness issue is preordained. *Id.* at 553.

Court may require.⁶ Perhaps, it is time to reconsider *Jurek* in light of that developing law.⁷

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

The evidence is similar to that in *Hitchcock* and *Eddings*. Those cases arguably teach us that it must be considered by the sentencer. Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not. The second question then asked whether Penry would be

⁶ Justice White, concurring in part, dissenting in part and concurring in the judgment in *Lockett* states, "[i]t . . . seems to me that the plurality strains very hard and unsuccessfully to avoid eviscerating the handiwork in *Proffitt v. Florida* and *Jurek v. Texas* . . ." *Lockett*, 438 U.S. at 623, 98 S.Ct. at 2983 (citations omitted). It was the same Florida statute that was approved in *Proffitt* that was applied unconstitutionally in *Hitchcock*.

⁷ The United States Supreme Court has recently granted certiorari in *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3287 (U.S. Oct. 9, 1987) (No. 87-5546), limited to the question:

Whether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme.

a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth,⁸ should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as *mitigating* evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

The state argues that Penry's counsel could, and did, argue the mitigating circumstances to the jury. The defense attorney in *Hitchcock* also argued to the jury to "consider the whole picture, the whole ball of wax." 107 S.Ct. at 1824. The prosecutor in *Hitchcock* then stood up and argued to the jury to consider the mitigating circumstances by number. *Id.* Likewise, here, the prosecutor was able to trump the defense counsel's argument:

I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues

⁸ Penry, apparently, was approximately 22 years old at the time of the crime.

and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the state's case because, ladies and gentlemen, I submit to you we've met our burden.

As in *Hitchcock*, the mere fact that defense counsel argued mitigating circumstances does not conclude the matter. The question is whether the jury could act on the mitigating circumstances and not impose the death penalty. The prosecutor's argument would exclude that consideration.

C.

Jurek expressly held that the Texas statute is constitutional. After *Jurek*, the Court has reiterated that stance a number of times. For example, in *Lockett* the Court stated that the Texas statute "survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett*, 438 U.S. at 607, 98 S.Ct. at 2966. Similar reasoning has been used in a number of other cases. *See, e.g., Zant*, 462 U.S. at 875 n. 13, 103 S.Ct. at 2742 n. 13; *Lockhart v. McCree*, 476 U.S. 162, —, 106 S.Ct. 1758, 1769-70, 90 L.Ed.2d 137 (1986). We think that a strong argument can be made that developing law, *see, e.g., Hitchcock*, is inconsistent. However, even if we were free to decide that inconsistency and reach a different result, *see Brock v. McCotter*, 781 F.2d 1152, 1157 n. 5 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986), we are not free to do so because prior Fifth Circuit decisions have rejected claims similar to Penry's. *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir.1986); *Granviel v. Estelle*, 655 F.2d 673, 675-77 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d

870 (1982). These prior panel holdings bar a different holding by us

IV.

The stay of execution is vacated. The judgment denying the writ is **AFFIRMED**.

GARWOOD, Circuit Judge, concurring:

I join Judge Reavley's thoughtful opinion, and append these remarks merely to further explore, from what may be my slightly different perspective, some of the possible ramifications of *Jurek* and its relationship to other Supreme Court decisions of the kind called attention to by Judge Reavley.

Undoubtedly, as Judge Reavley so cogently explains, there is a tension between the two major themes of the Supreme Court's recent capital sentencing jurisprudence, and it is certainly not inconceivable that the ultimate resolution of that tension may undermine *Jurek*. However, I do not understand us to suggest, and I do not believe, that such a result is either inevitable or desirable.

That the Court knew what it was doing in *Jurek* must be assumed not only out of proper respect for the Court, but also because of the concurring opinion therein of Justice White (joined by the Chief Justice and Justice Rehnquist), as well as Justice White's dissent (joined by the Chief Justice and Justices Blackmun and Rehnquist) in *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and Justice Rehnquist's dissent in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), each decided the same day as *Jurek*. Justice White's *Jurek* concurrence observed that the Texas "statute does not extend to juries discretionary power to dispense mercy." 96 S.Ct. at 2959. His dissent in *Roberts* points out that under the Texas statute upheld in *Jurek*, "capital punishment is required if the defendant is found guilty of the

crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory." 96 S.Ct. at 3018. And, in *Woodson*, Justice Rehnquist's dissent points out that under the Texas system upheld in *Jurek*, "[t]he jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty *must* be imposed." 96 S.Ct. at 2996 (emphasis in original). It is true, of course, that Justice Stewart's plurality opinion in *Jurek* relied heavily on the breadth of circumstances which the Texas Court of Criminal Appeals in *Jurek* itself (as well as in another case) had indicated could properly be considered in answering the sentencing special interrogatories, particularly the second. 96 S.Ct. 2950 at 2956-57. However, it is to be noted in this connection that the Texas courts, both generally and in Penry's case, have kept the promise of *Jurek*, and have not to any extent narrowed the circumstances appropriate for consideration under the sentencing special issues as indicated in *Jurek*.

Moreover, since *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)—the decision most in tension with *Jurek*—the Supreme Court has cited *Jurek* favorably in numerous cases. See *Sumner v. Shuman*, — U.S. —, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453-54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). See also *Tison v. Arizona*, — U.S. —, 107 S.Ct. 1676, 1687, 95 L.Ed.2d 127 (1987) (citing *Selva v. State*, 680 S.W.2d 17, 22 (Tex.Crim.App.1984)). As reflected

below, *Jurek* was likewise frequently cited with approval prior to *Eddings*. See also, e.g., *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2524 n. 1, 65 L.Ed.2d 581 (1980).

The scope of those more recent Supreme Court decisions which are in tension with *Jurek* is not entirely clear respecting what considerations the sentencer must be allowed to take into account in determining the appropriateness of a death sentence. In Penry's case, not only was the jury plainly allowed to hear and instructed to consider *all* evidence proffered, but also the special issues submitted adequately allowed the jurors to give effect to this evidence insofar as they might deem it relevant either to the moral culpability of Penry's own conduct and state of mind on the particular occasion in question or to his possible rehabilitation or future dangerousness to society. What the special issues did not afford the jury a vehicle for giving effect to was Penry's implicit plea that, although his own individual actions and state of mind on the occasion in question were morally culpable and although his character generally was such that he was not a good prospect for rehabilitation and would pose a continuing danger to society, *nevertheless* he was not to blame either for his own thus unsatisfactory character, or for his own immoral conduct and state of mind on the occasion in question, *because* these were products of his tragically disadvantaged youth. It is not entirely clear that the Supreme Court's decisions respecting individualized consideration of the offense and offender have gone so far as to require that effective consideration always be given by the sentencer to such a plea.

The initial individualized consideration cases, *Woodson* and *Roberts* (Stanislaus), were decided the same day as *Jurek*. They each involved mandatory capital sentences for certain general categories of homicide. In *Roberts*, the Court decried the Louisiana statute's "lack of focus on the circumstances of the particular offense and the character and propensities of the offender." 96 S.Ct. at 3006.

In *Woodson*, the Court noted that the North Carolina statute, which embraced the felony murder doctrine, "accords no significance to *relevant facets* of the character and record of the individual offender or the circumstances of the particular offense." 96 S.Ct. at 2991 (emphasis added). Neither criticism is substantially applicable to *Jurek*. In *Roberts* (Harry) *v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), decided the following year, another mandatory capital sentencing scheme was struck down. The Court observed: "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and *even* the existence of circumstances which the offender *reasonably* believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer" but which the Louisiana statute did not take into account. *Id.* at 1995 (emphasis added). Again, *Jurek* is not subject to this criticism. These statutes all had in common the prohibition of any considerations other than guilt of the particular offense.

The Court first went beyond that category of case the next year in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which involved a death sentence imposed on a twenty-one-year-old woman who was an accomplice to the murder but did not actually kill the victim. There was evidence that "her prognosis for rehabilitation" . . . was favorable," and she had no major offenses on her record. *Id.* at 2959. The sentencing statute was held invalid because it "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Id.* at 2961. Particular reliance was placed on *Woodson*, and *Jurek* was cited with apparent approval. *Id.* at 2963. Justice Blackmun limited his concurrence to cases where the death sentence was imposed on "a defendant who only aided and abetted a murder, without permitting any con-

sideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969. Justice Marshall, in his concurrence, pointed out that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" and that the Ohio statute "precluded any effective consideration of her degree of involvement in the crime, her age, or her prospects of rehabilitation." *Id.* at 2972.

It is apparent that none of the considerations which *Lockett* held must be taken into account in determining whether a sentence of death should be imposed, were precluded from being given effective consideration by the jury in Penry's case. Each of these considerations is relevant to either the first or second sentencing inquiry under the Texas scheme as announced in *Jurek* and applied in this case.

It is also to be noted that Justice White concurred in the result in *Lockett* on substantive grounds, namely, that the Eighth Amendment prohibited capital punishment for one who did not intend the death of the victim. *Id.* at 2983. This view was largely vindicated in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where the Court held that the death sentence could not constitutionally be imposed on one who did not kill or attempt to kill or have any intention of participating in or facilitating a killing. *Id.* at 3377. *Enmund* placed principal reliance on *Lockett* and *Woodson*. *Id.* The *Enmund* Court noted that "Enmund's own conduct" must be the basis for punishment and "[t]he focus must be on his culpability." *Id.* (emphasis in original). Consideration of the deterrence justification for punishment made defendant's state of mind particularly relevant. *Id.* The Court observed that "[a]s for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions

were," and that "Enmund's criminal culpability must be limited to participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* at 3378. In these passages, the Court is obviously measuring personal responsibility and moral guilt by the circumstances of the particular offense and the defendant's participation and state of mind with reference to it. These considerations appear to be adequately taken into account in the Texas sentencing scheme. The *Enmund* analysis was reconfirmed in *Tison*, 107 S.Ct. at 1683, 1687.

Likewise, in other cases where the Supreme Court has struck down a capital sentencing scheme because of its mandatory nature or its preclusion of consideration of mitigating factors, a significant and perhaps crucial aspect of the decision has been that matters relating to the accused's own participation in the crime, or his own state of mind in respect to it, or his potential for rehabilitation or lack of future dangerousness, have been deemed legally irrelevant. Thus, in *Skipper*, the Court held that it was constitutional error to exclude evidence relevant to the accused's "probable future conduct if sentenced to life in prison," and that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." 106 S.Ct. at 1671. This was stated to be merely the converse of *Jurek*. *Id.* See also *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 382-83, 78 L.Ed.2d 187 (1983) (relevance of future dangerousness). In *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), a death sentence was set aside because the trial court deemed that it was legally barred from taking any account of certain considerations which the defendant offered in mitigation including, as the court twice mentioned, "his potential for rehabilitation" or "his capacity for rehabilitation." *Id.* at 1824. The Court noted that "the exclusion of mitigating evidence of the sort at

issue here renders the death sentence invalid," and further observed, quoting *Skipper*, that a capital defendant must be "permitted to present any and all relevant mitigating evidence that is available." *Id.* (emphasis added). Most recently, in *Sumner*, the Court struck down Nevada's mandatory death sentence for those committing first degree murder while under a sentence of life imprisonment without possibility of parole. The Court noted that its prior decisions, including *Enmund* and *Tison*, established that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime," and that this consideration was not adequately reflected in the Nevada statute. 107 S.Ct. at 1724. *Sumner* also noted as a possible mitigating factor excluded by the Nevada law "even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct." 107 S.Ct. at 2725 (quoting *Roberts* (Harry)) (emphasis added). The *Sumner* Court went on to observe that in the case before it a possible mitigating factor which the Nevada law ignored was the defendant's "behavior during his 15 years of incarceration, including whether the inmate murder was an isolated incident of violent behavior or merely the most recent in a long line of such incidents." *Id.* at 2726. These factors are clearly consistent with *Jurek*, which, as previously noted, *Sumner* cites with approval.

Of all the cases in this area, *Eddings* is most in tension with *Jurek*. *Eddings* is certainly susceptible of the reading that considerations respecting a defendant's disadvantaged background, of the sort that Penry sought to have the jury give effect to at his sentencing hearing, may not be deemed legally irrelevant. *Eddings* observed that the sixteen-year-old defendant "had been deprived of the care, concern and parental attention that children deserve," and that "the background and mental and emo-

tional development of a youthful defendant [must] be duly considered in sentencing." 102 S.Ct. at 877. However, it is not entirely clear that as broad a reading as this language considered in isolation suggests must be given to *Eddings*. There the sentencing authority would, as a matter of law, consider as a mitigating factor *nothing* except *Eddings*' chronological youth. *Id.* at 873-74. The Court's opinion further points out that there was testimony from a sociologist "that *Eddings* was treatable," and from a psychiatrist "that, if treated, *Eddings* would no longer pose a threat to society." *Id.* at 873. It likewise noted a psychologist's testimony that *Eddings* had a sociopathic or antisocial personality, but that "approximately 30% of youths suffering from such a disorder grew out of it as they aged." *Id.* Apparently the Oklahoma sentencing authorities also deemed all this evidence legally irrelevant. Certainly the potential for rehabilitation, and the fact that a person can be treated so that he will not be a danger to society, or is youthful so may grow out of his difficulties, may be effectively considered under the Texas scheme. That the Court mentioned this evidence in some detail in *Eddings* suggests that it thought it significant. Justice Powell wrote the majority opinion in *Eddings* and Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. In *Skipper*, on the other hand, Justice White, who had dissented in *Eddings*, wrote the majority opinion and Justice Powell, with whom the Chief Justice and Justice Rehnquist joined, dissented on the point relevant here (although they concurred in the result on other grounds). This would appear to indicate that the Court has not fully crystallized its view on this subject.

The foregoing review of the Court's leading opinions in the area suggests that not every aspect of whatever is offered by the defense as being in mitigation must constitutionally be given effective consideration by the sentencer. As observed, the Court has referred to "relevant" mitigating evidence, "reasonably" believed moral

justification, and the "relevant" facets of the character and record of the defendant. In *California v. Brown*, — U.S. —, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the Court refused to reverse on account of an instruction that the jury could not be swayed by "sympathy" or "mere sympathy." The *Brown* Court did not regard such an instruction as inconsistent with the rule that "the capital defendant generally must be allowed to introduce any *relevant* mitigating evidence regarding his 'character or record and any of the circumstances of the offense.'" *Id.* at 839 (quoting *Eddings* quoting *Lockett*; emphasis added).

Note must also be taken of the other principal recent theme in the Supreme Court's capital punishment jurisprudence, namely, that "sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses." *Brown*, 107 S.Ct. at 839. This, of course, stems from the concurring opinions of Justice Douglas, Stewart, and White in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 2727, 2760, 2763, 33 L.Ed.2d 346 (1972). In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court struck down a threshold aggravating circumstance as being overly vague. The plurality noted that this violated its warning in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859 (1976), that such vague standards would "fail adequately to channel the sentencing decision *patterns* of juries with the result that a *pattern* of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Godfrey*, 100 S.Ct. at 1765 (quoting *Gregg*; emphasis added) (*Jurek* is also cited approvingly, 100 S.Ct. at 1764). In *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), where the Court held that jury sentencing was not required for capital cases, it explicated this theme as follows:

"If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Id.* at 3162.

The Court further observed that "the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable." *Id.* at 3163. Moreover, "[t]here must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Id.* at 3162 n. 7.

However, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the crucial plurality opinion by Justice Stewart, joined by Justices Powell and Stevens, had observed that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced *under a system that does not create a substantial risk of arbitrariness or caprice*." *Id.* at 2939 (emphasis added). In this connection, in *Zant* the Court noted that it did not require jury instructions providing "specific standards to guide the jury's consideration of aggravating and mitigating circumstances." 103 S.Ct. at 2742. And, as the concurring opinion of Justice Stevens, joined by Justice Powell, in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 3431 n. 2, 77 L.Ed.2d 1134 (1983), recognized, neither *Lockett* nor *Eddings* established that any particular weight need be given by the sentencer to the mitigating circumstances which those cases held could not be excluded as a matter of law from any consideration.

It would appear, especially given this lack of requirement for instructional guidance or for any particular weight to be given allegedly mitigating circumstances, that the broader the range of such mitigating circum-

stances and the more attenuated their relationship to valid penological considerations, the more hindered is the system in the performance of its function of rationally distinguishing between those defendants for whom death is appropriate and those for whom it is not. Similarly, in such circumstances the discretion of the sentencing authority becomes more unlimited and unreviewable. It is difficult to understand how a system which requires that the sentencer be given unlimited discretion to assign whatever weight it desires to whatever it might consider to be mitigating can be fairly described as tending "to ensure that the death penalty will be imposed in a consistent, rational manner," *id.* at 3430 (concurring opinion of Stevens, J.), or to minimize "sentencing decision patterns . . . [that are] arbitrary and capricious." *Godfrey*, 100 S.Ct. at 1765 (quoting *Gregg*; emphasis added).

The foregoing suggests that the more closely and objectively related an alleged mitigating circumstance is to a valid penological consideration, the stronger the argument for requiring that the sentence be allowed to take that circumstance into account. The kind of factor which Penry asserts that the jury was not afforded an appropriate vehicle to give effect to is arguably quite remote from the recognized purposes of punishment and justifications for the death sentence. While the retributive justification for the death penalty depends to some extent on the degree of the defendant's culpability, as well as on the nature and results of the offense, the Supreme Court's decisions indicate that culpability in this connection refers to the defendant's culpability as directly related to his participation in and state of mind respecting the particular offense in question. See *Enmund*, 102 S.Ct. at 3378; *Tison*, — U.S. —, 107 S.Ct. 1676, 1683, 1687, 95 L.Ed.2d 127. See also *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983). Such a determination, as well as that respecting rehabilitation potential, can be made with relative objectivity based on the evidence in a particular case.

When the sentencer must go beyond that, as Penry would have it do, and must determine not only the accused's rehabilitation potential and his culpability on the occasion in question but also whether, in essence, he was at fault for being at fault, the decisionmaking process becomes vastly more subjective and necessarily involves speculation about wholly immeasurable abstractions such as free will and personal responsibility, as to which there is little of either common understanding or common agreement. As such, capital sentencing would also inevitably become far more unpredictable and unreviewable. Would it then, perhaps a few years later, again be subject to challenge on that ground? *

* In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), the Court held it was *not* unconstitutional to grant the jury "absolute discretion" to impose or not to impose the death sentence on one committing murder in the first degree. *Id.* at 1456. Interestingly, in the companion case of *Crampton v. Ohio*, the Court noted, but suggested no error in, the instruction to the jury that it "'must not be influenced by any consideration of sympathy.'" *Id.* at 1461. By the next year, during which Justices Harlan and Black departed the Court, *McGautha's* "absolute discretion" holding was substantially rendered a dead letter by *Furman*, as was confirmed four years later in *Gregg*, 96 S.Ct. at 2936 n. 47. This may reflect the rapidity, or perhaps the ambiguity, of "the evolving" of "standards of decency" referenced in Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), which had likewise proclaimed the constitutionality of capital punishment. *Id.* at 597-98. Now, a few years still later, has *McGautha* returned, though in the altered form of a mandatory requirement? To some extent, the answer, in light of the Court's post-*Gregg* opinions, must be "yes," but just to what extent is not fully clear.

Answering the latter question is particularly difficult in light of the fact that the Eighth Amendment's proscription of "cruel and unusual punishments" appears, from its text, context, and history, to be *substantive*, at least apart from whatever procedural connotations "unusual" may have. The latter may be consistent with the procedural approach of *Gregg* and of Justices Douglas, Stewart, and White in *Furman*. But the then unprecedented *procedural* reading of the Eighth Amendment given by *Lockett* thrusts entirely in the

It is also questionable whether unlimited consideration of assertedly mitigating factors can be appropriately defended as a one-way street leading away from capital punishment. Such an argument is not responsive to the asserted desirability of minimizing arbitrariness and indiscriminacy. Moreover, it is doubtful that the street will really be one-way. The Court has held that a state may prove the nonexistence of potential mitigating circumstances, *see Barclay*, 103 S.Ct. 3418 at 3428, and where the range of potentially mitigating factors is almost unlimited what one sentencer may regard as mitigating another may view as aggravating.

Finally, even if, as now appears to be the case, the principles of the *Furman* plurality do not *require* a state to put any limits on the factors which the sentencer may determine to be mitigating, nevertheless this does not mean that a state has no voice in choosing the "substantive factors relevant to the penalty determination." *Ramos*, 103 S.Ct. at 3453. *See also id.* at 3452. While it is plain that whatever discretion a state may have in this respect does not extend to excluding from all consideration the defendant's potential for rehabilitation, his lack of dangerousness, or the nature of his participation in or state of mind respecting the crime charged, nevertheless, it may be that a state has room to place *some* other limits on the sentencer's discretion, at least if those limits subserve valid penological purposes. Surely *Furman*

opposite direction. That the Court has since embraced such a *Lockett*-type procedural requirement as a component of its current Eighth Amendment jurisprudence cannot be doubted. Nor can it be doubted, however, that such a component is not only opposite from that of *Gregg* and the *Furman* three, but is also distinct from the traditional procedural due process approach exemplified, among the post-*Gregg* capital punishment cases, by decisions such as *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Thus, though we know that the *Lockett*-type procedural component exists, there are fewer of the normal guideposts by which to make a principled gauging of its limits and contours.

teaches us that a valid penological purpose is fostering predictability, consistency, objectivity, rationality, and reviewability in capital sentencing. That purpose would seem to be fostered by not affording the jurors a vehicle by which to give decisive effect to the sort of considerations advanced by Penry, insofar *only* as the jurors may deem those considerations wholly irrelevant to either of the two Texas capital sentencing special issues.

Accordingly, while there is indeed a tension between *Jurek* and expressions in other recent decisions of the Court, it is by no means clear that *Jurek* has been or should be fatally undermined.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2466

JOHNNY PAUL PENRY,
Petitioner-Appellant,

versus

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(December 23, 1987)

Before REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 87-6177

JOHNNY PAUL PENRY,
Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1 and 2 presented by the petition.

June 30, 1988

(6)
No. 87-6177

Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, Director
Texas Department of Corrections

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONER

CURTIS C. MASON
Attorney for Petitioner
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 295-6371 Ext. 1370

QUESTIONS PRESENTED FOR REVIEW

1. At the punishment phase of a Texas capital murder trial, must the trial court upon a proper request, (a) instruct the jury that they are to take into consideration all evidence that mitigates against the sentence of death and (b) define terms in the three statutory questions in such a way that in answering these questions all mitigating evidence can be taken into consideration?
2. Is it cruel and unusual punishment to execute an individual with the reasoning capacity of a seven year old?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
PROCEEDING AND DISPOSITION IN THE COURTS BELOW	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	7
THE TEXAS CAPITAL PUNISHMENT STATUTE AS APPLIED TO PENRY WAS A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION	7
EXECUTION OF A MENTALLY RETARDED PERSON WITH THE REASONING ABILITY OF A SEVEN-YEAR-OLD IS CRUEL AND UNUSUAL PUNISHMENT	8
ARGUMENT AND AUTHORITIES	9
THE TEXAS CAPITAL PUNISHMENT STATUTE AS APPLIED TO PENRY WAS A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION	9
The Assurance Made In <i>Jureck</i>	10
The Plurality Opinion In <i>Franklin</i>	12
The Concurring Opinion In <i>Franklin</i>	13
The Dissent In <i>Franklin</i>	16
Failure Of The Texas Court Of Criminal Appeals To Implement The Assurance Made In <i>Jureck</i>	18
The Dicta In Circuit Judge Reevely's Opinion Below	32
EXECUTION OF A MENTALLY RETARDED PERSON WITH THE REASONING ABILITY OF A SEVEN-YEAR-OLD IS CRUEL AND UNUSUAL PUNISHMENT	35
CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Page
<i>Blansett v. State</i> , 556 S.W.2d 322 (Tex. Cr. App. 1977) ..	25
<i>California v. Brown</i> , ____ U.S. ____, 107 S.Ct. 837 (1987) ..	28
<i>Cannon v. State</i> , 691 S.W.2d 664 (Tex. Cr. App. 1985) ..	18
<i>Clark v. State</i> , 717 S.W.2d 910 (Tex. Cr. App. 1986)	18
<i>Cordova v. State</i> , 733 S.W.2d 175 (Tex. Cr. App. 1987) ..	18, 25
<i>Drew v. State</i> , 743 S.W.2d 207 (Tex. Cr. App. 1987) ..	29, 30
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	10, 25
<i>Ford v. Wainwright</i> , ____ U.S. ____, 106 S.Ct. 2595 (1986)	35, 37, 38
<i>Franklin v. Lynaugh</i> , ____ U.S. ____, 108 S.Ct. 2320 (1988)	12, 13, 16, 32
<i>Gardner v. State</i> , 730 S.W.2d 675 (Tex. Cr. App. 1987) ..	29
<i>Giles, Ex Parte</i> , 502 S.W.2d 774 (Tex. Cr. App. 1973) ..	42
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	35
<i>Granviel v. Estelle</i> , 655 F.2d 673 (5th Cir. 1981)	25
<i>Granviel v. State</i> , 723 S.W.2d 141 (Tex. Cr. App. 1986) ..	27
<i>Hernandez v. State</i> , ____ S.W. 2d. ____, No. 69, 649, (Tex. Cr. App. June 29, 1988)	31
<i>Hitchcock v. Dugger</i> , ____ U.S. ____, 107 S.Ct. 1821 (1987)	13, 35
<i>Jureck v. State</i> , 522 S.W.2d 934 (Tex. Cr. App. 1975) ..	10, 11
<i>Jureck v. Texas</i> , 428 U.S. 262 (1976)	10, 13, 18, 25, 35
<i>King v. State</i> , 553 S.W.2d 105 (Tex. Cr. App. 1977)	18
<i>Lane v. State</i> , 743 S.W.2d 617 (Tex. Cr. App. 1987)	29
<i>Penry v. Lynaugh</i> , 832 F.2d 915 (5th Cir. 1987) ..	1, 3, 7, 16, 32
<i>Penry v. State</i> , 691 S.W.2d 636 (Tex. Cr. App. 1985)	3, 18, 20, 27
<i>Stewart v. State</i> , 686 S.W.2d 118 (Tex. Cr. App. 1984) ..	18
<i>Thompson v. Oklahoma</i> , ____ U.S. ____, 103 S.Ct. 2687 (1988)	35, 39, 41
<i>Walker, Ex Parte</i> , 13 S.W. 861 (Tex. Cr. App. 1890)	38
<i>Williams v. State</i> , 674 S.W.2d 315 (Tex. Cr. App. 1984) ..	21
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	10, 37

Table of Authorities Continued

	Page
CONSTITUTION AND STATUTES	
Art. 37.071 Texas Code Criminal Procedure.	2, 9
Eighth Amendment to the United States Constitution.	2, 10, 37, 39, 50
Sect. 12.31(b) Texas Penal Code.	2, 26, 28
BOOKS, JOURNALS AND NEWSPAPER ARTICLES	
American Bar Association Standards for Criminal Justice	37
Classifications in Mental Retardation, 1983 Revision ...	37
Death Penalty Bar Urged for Retarded, Austin American Statesman, April 16, 1983, at B-3.	39
In the Assembly, The Sun, Baltimore, Maryland, March 25, 1988.	42
Legislatures, Schaefer Close Mercurial '88 Session, The Sun, Baltimore, Maryland, April 12, 1988 at 4A, Col. 3.	42
Mentally Retarded Criminal Defendants, 53 George Washington L. Rev. 414.	38
Resolution; 24 Mental Retardation, No. 1, page 47.	39

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 832 F.2d 915 (5th Cir. 1987), and is set out on pages 284 - 319 of the Joint Appendix (J.A.)

The memorandum decision of the United States District Court for the Eastern District of Texas has not been reported. It is set out on pages J.A. 234 - 273.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254 Petitioner filed a petition for writ of habeas corpus by a person in state custody in the United States District Court, Eastern District of Texas, Lufkin Division on April 28, 1987. In a memorandum opinion, the writ was denied on May 8, 1987; final judgment was entered (ROA 3, J.A. 274)¹ and certificate of probable cause to appeal to the United States Court of Appeals for the Fifth Circuit was granted. ROA 1, J.A. 275. The Fifth Circuit rendered its judgment denying relief on November 25, 1987. Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987. J.A. 320. Petition for Writ of Certiorari was filed in this Court January 4, 1988 and Certiorari was granted on questions 1 and 2 on June 30, 1988. J.A. 321. Jurisdiction in this Court is pursuant to 28 U.S.C. § 1254 which provides for review by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution;

¹ The number after ROA is the page number of the Record on Appeal filed in the United States Court of Appeals for the Fifth Circuit. The number after J.A. is the page number of the Joint Appendix.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Art. 37.071 Texas Code of Criminal Proc.:

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

and § 12.31 (b) Texas Penal Code:

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

STATEMENT OF THE CASE

PROCEEDING AND DISPOSITION IN THE COURTS BELOW:

Penry was tried on a change of venue in the 258th Judicial District Court, Trinity County, Texas. The jury

answered all three special issues yes and Penry was sentenced to death on April 18, 1980. His conviction was affirmed, in a published opinion, by the Court of Criminal Appeals of Texas May 1, 1985. *Penry v. State*, 691 S.W.2d 636 (Tex. Cr. App. 1985). Petition for Writ of Certiorari was denied by the United States Supreme Court on January 13, 1986. ____ U.S. ____, 106 S.Ct. 834 (1986). Writ of Habeas Corpus was denied by the Court of Criminal Appeals of Texas without written opinion on May 5, 1986. A writ of habeas corpus under 28 U.S.C. § 2254 was denied by the United States District Court, Eastern District of Texas, Lufkin Division, on April 28, 1987 with final judgment entered (ROA 3, J.A. 274) and certificate of probable cause to appeal granted on May 8, 1987. ROA 1, J.A. 275. The United States Court of Appeals for the Fifth Circuit panel decision was rendered November 25, 1987. Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987. J.A. 320. Petition for Writ of Certiorari was filed on January 4, 1988 and certiorari granted on June 30, 1988. J.A. 321.

STATEMENT OF FACTS:

"On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, . . ."

Penry v. Lynaugh, 832 F.2d 915, 917 (5th Cir. 1987), J.A. 285.

Before she died she gave a description of her assailant. Two local sheriff's deputies decided the description was that of Johnny Paul Penry. They picked him up at his father's house, took him first to the police station where they were joined by several other law enforcement officers, they all went back to the house where Penry lived and then to the crime scene. At the crime scene, Penry

made a verbal admission after which he was taken before a magistrate following which a statement was reduced to writing which Penry, a retarded illiterate, signed. The next day, another more detailed statement was reduced to writing and signed by Penry. *id.* J.A. 285-6.

At the punishment phase of Penry's trial, the following objections were made to the jury instructions;

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term "deliberately."

* * *

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."

* * *

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term "continuing threat to society."

* * *

OBJECTION 8: The next objection of the Defendant is that the Defendant objects to the submission of the verdict form permitting the jury to assess the death penalty because under the evidence produced in this cause said punishment would be cruel and unusual punishment prohibited by the eighth amendment to the United States Constitution and by Article One, Section Thirteen of the Texas Constitu-

tion, because among other reasons it is excessive in that the punishment involves the unnecessary and wanton infliction of pain and is grossly out of proportion to the severity of the crime, especially in view of the mental illness and condition of the defendant.

* * *

OBJECTION 10: The next objection is the Defendant further objects to the Court's Charge because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances.

OBJECTION 11: The next objection to the Court's Charge

* * *

is that it fails to instruct the jury to the following effect: "you may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in . . . the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is

that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated.

XVII R. 2659 · 2664.² J.A. 210-2.

These objections to the charge were overruled. XVII R. 2664. J.A. 213.

The mitigating evidence in Penry's case was discussed by the U.S. District Court below as follows;

This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

² The Roman numeral is the volume number of the Texas Court of Criminal Appeals' record on appeal filed as an exhibit in the court below. The number after R. is the page number.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

ROA 10-11, J.A. 236-7.

The United States Court of Appeals for the Fifth Circuit summarized Penry's mitigation facts stating,

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

Penry v. Lynaugh, 832 F.2d at 925. J.A. 303.

SUMMARY OF ARGUMENT

THE TEXAS CAPITAL PUNISHMENT STATUTE AS APPLIED TO PENRY WAS A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Under the Texas Capital Punishment Statute, the punishment phase consists of three special issues relating to whether the defendant acted deliberately in causing the death of the deceased, whether the defendant would constitute a continuing threat to society and whether the killing was an unreasonable response to provocation, if any, by the deceased. If all three are answered yes, the defendant is sentenced to death. This Court has held that, any capital punishment statute that does not provide a means for the sentencing authority to take into consideration all the evidence that mitigates against the sentence of

death, is a violation of the Cruel and Unusual Punishment clause of the Eighth Amendment to the United States Constitution. Penry requested jury instructions that would provide a means for the jury to take into consideration the fact that he was mentally retarded with the reasoning capacity of a six to seven-year-old and had an abused childhood. These factors would increase the likelihood he would be a future danger but are also factors which reduce his culpability. These jury instructions were denied. Failure to give the requested instructions prevented the jury from considering all the evidence that mitigated against the sentence of death and accordingly his sentence of death is cruel and unusual punishment.

**EXECUTION OF A MENTALLY RETARDED PERSON WITH
THE REASONING ABILITY OF A SEVEN YEAR OLD IS
CRUEL AND UNUSUAL PUNISHMENT:**

This Court has held that to execute a defendant that was 15 years old at the time he did the offense and to execute a defendant that is presently insane violates contemporary standards and is cruel and unusual punishment. To execute Penry, who has the reasoning ability of a six or seven year old is a parallel issue. The ABA Standards for Criminal Justice state that mental retardation should mitigate against the maximum punishment. Public opinion surveys show that three out of four people are against the execution of the mentally retarded. One state has recently passed a law which prohibits the execution of mentally retarded defendants. Texas prohibits the execution of anyone that was under 17 years old at the time the offense was committed. The American Association on Mental Retardation is against the execution of the mentally retarded. To execute Penry would be against contemporary standards and accordingly would be cruel and unusual punishment.

ARGUMENT AND AUTHORITIES

**THE TEXAS CAPITAL PUNISHMENT STATUTE AS
APPLIED TO PENRY WAS A VIOLATION OF THE CRUEL
AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH
AMENDMENT TO THE UNITED STATES CONSTITUTION:**

In concluding that the execution of a mentally retarded person was not cruel and unusual punishment the United States District Court below found that mental retardation was nothing more than one of the mitigating factors to be considered. ROA 13, J.A. 238. In Texas the punishment phase of a capital murder trial consists of the jury answering three narrowly drawn special issues:

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

Art. 37.071 Tex. Code Crim. Proc. Ann.

The first two special issues are actually aggravating factors while the third issue is a mitigating factor.

The Assurance Made In Jureck:

Any death penalty statute that fails to require that the trier of fact at the punishment phase must consider all mitigating circumstances before assessing the death penalty is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution's prohibition of cruel and unusual punishment. *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Jurek v. Texas*, 428 U.S. 262, 272 (1976) this Court held that,

The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

* * *

This Court further observed that at that time,

The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

id.

By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing functions.

id. at 276.

The concurring opinion in *Jurek v. Texas* by Justice White agreed that the Texas Statute was constitutional

because "The statute does not extend the juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *id.* at 279.

Judge Odom, concurring in part and dissenting in part, to the opinion in *Jurek v. State*, agreed that the statute did not extend juries discretionary power stating;

Where is the "discretion" referred to in the majority opinion? Each pertinent portion of Art. 37.071 uses "shall", the command form, rather than the permissive "may." The jury is required to answer special issues. These questions each require a factual determination by the jury. If the fact questions are answered in the affirmative, pronouncement of a sentence calling for the ultimate penalty is absolutely mandated by Art. 37.071. The word "shall" in Art. 37.071 inflexibly requires certain procedures to be followed, allowing no discretion in the punishment to be received by a defendant who is guilty of capital murder.

Before a person may serve as a juror, he must state under oath that the mandatory penalty of death or life imprisonment will not affect his deliberations on any issue of fact. Art. 1257(d), V.A.P.C. [now § 12.31 (b) Texas Penal Code]. In order to grant "mercy" in a particular case, the jurors must ignore their oaths and return a deliberately falsified answer to one of the fact issues in Art. 37.071(b). Unless this Court is to presume that jurors will ignore their oaths and return perjured answers to one or more of the issues, a complete prevarication, solely to arrive at the result they may feel is proper in a given case, we must hold this statute is mandatory, leaving no discretion to the jury in the matter of assessing punishment.

522 S.W.2d 934, 944 (Tex. Cr. App. 1975)

The opinion in *Jurek v. State*, after listing all the factors relied upon by this Court in finding the three

Special Issues were adequate to assure all mitigating evidence could be considered by the sentencing jury concluded that,

To eliminate all discretion on the part of the jury would be a risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence.

id. at 940.

Based upon this assurance that the Texas Court of Criminal Appeals was defining the terms in the "three questions" in such a way that the jury, in answering these three questions, could take into consideration all mitigating circumstance, the statute was upheld.

The Plurality Opinion In Franklin:

Twelve years later, the plurality opinion in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320 (1988), after first disposing of Franklin's argument that the Texas statute, without the jury instructions requested, precluded the jury from taking into consideration the mitigating factors of good adjustment to prison life and "lingering doubt", addressed the constitutionality of the Texas Statute stating,

It is true that since *Jurek* was decided, this Court has gone far in establishing a constitutional entitlement of capital defendants to appeal for leniency in the exercise of juries' sentencing discretion. See, e.g., *Eddings v. Oklahoma*, 455 U.S. at 113-117, *Lockett v. Ohio*, 438 U.S., at 608 (opinion of Burger, C.J.). But even in so doing, this Court has never held that jury discretion must be unlimited or unguided;

* * *

Our cases before and since have similarly suggested that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses" and that the "Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987). See also *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (joint opinion); *Gregg v. Georgia*, supra, at 189, 195, n. 46, 196, n. 47, 198 (joint opinion).

Arguably these two lines of cases - *Eddings* and *Lockett* on the one hand, and *Gregg* and *Proffitt* on the other - are somewhat in "tension" with each other. See *California v. Brown*, 479 U.S., at 544 (O'Connor, J., concurring).

id. at ___, 108 S.Ct. at 2331.

Justice White's plurality opinion concludes that the Texas Special Issues adequately, "allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion."

id. at ___, 108 S.Ct. at 2332.

This Court in *Hitchcock v. Dugger*, without any dissent, found that the Florida death penalty statute upheld at the same time as *Jurek v. Texas*, was unconstitutional as applied. ___ U.S. ___, 107 S.Ct. 1821 (1987). Accordingly, the tension between the two lines of cases, *Eddings* and *Lockett* on the one hand and *Gregg* and *Proffitt* on the other appeared to have been resolved with this Court, in a unanimous opinion, following the *Lockett* and *Eddings* line of cases. *id.* at 1822.

The Concurring Opinion In Franklin:

Justice O'Connor, concurring in *Franklin*, expressed doubt about the portion of the plurality opinion where it,

... goes on to suggest that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty, *Ante*, at 2330, 2331, n. 10. Unlike the plurality, I have doubts about a scheme that is limited in such a fashion.

id. at ___, 108 S.Ct. at 2332.

Since the decision in *Jurek*, we have emphasized that the Constitution guarantees a defendant facing a possible death sentence not only the right to introduce evidence mitigating against the death penalty but also the right to consideration of that evidence by the sentencing authority. *Lockett v. Ohio*, 438 U.S. 586 (1978), established that a State may not prevent the capital sentencing authority "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Id.*, at 605 (plurality opinion). We reaffirmed this conclusion in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and in *Hitchcock v. Dugger*, 481 U.S. ___ (1987).

In my view, the principle underlying *Lockett*, *Eddings* and *Hitchcock*, is that punishment should be directly related to the personal culpability of the criminal defendant.

"[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J.,

concurring) (emphasis in original).

* * *

If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

___ U.S. ___, 108 S.Ct. at 2332-3.

The mitigating evidence in Penry's case was discussed by the U.S. District Court as follows;

This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.

Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

ROA 10-11, J.A. 236-7.

The United States Court of Appeals for the Fifth Circuit similarly summarized Penry's mitigating facts stating,

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

Penry v. Lynaugh 832 F.2d at 925, J.A. 303.

The Dissent In Franklin:

Justice Stevens, dissenting in *Franklin v. Lynaugh* discussed the three special issues;

On its face, the Texas capital sentencing scheme makes no mention of mitigating evidence. *Jurek*, 428 U.S., at 272. Instead it merely asks the jury to give a "yes" or "no" answer to two, and in some instances three, "Special Issues."

* * *

Although the jury was informed that if it answered both issues "yes" petitioner would be sentenced to death, neither of the Special Issues as they would have been understood by reasonable jurors gave the jury the opportunity to consider petitioner's mitigating evidence of past good conduct in prison to the extent that it encompassed matters beyond those relevant to answering the Special Issues. Petitioner therefore was at least entitled to an instruction informing the jury that it could answer one of the issues "no" if it found by that evidence that petitioner's character was such that he should not be

subjected to the ultimate penalty. The failure to give such an instruction removed that evidence from the sentencer's consideration just as effectively as would have an instruction informing the jury that petitioner's character was irrelevant to the sentencing decision.

— U.S. at —, 108 S.Ct. at 2337.

* * *

As the plurality recognizes, *ante*, at 2330, petitioner has not raised a challenge to the constitutionality of the Texas sentencing scheme. Rather, he has merely asserted that the trial court's failure to give the jury instructions he requested was constitutional error.

Our holding in *Lockett* previously has required us to vacate death sentences that were imposed pursuant to facially valid capital sentencing statutes. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), although the statute provided that a defendant could present evidence "as to any mitigating circumstances," *id.*, at 115 n. 10, we set aside the death sentence because it appeared that the trial judge had not considered certain mitigating evidence offered by defendant. See *id.*, at 112-113. In *Hitchcock*, 481 U.S., at —, even though we had sustained the Florida capital sentencing statute against a facial attack in *Proffitt v. Florida*, 428 U.S. 242 (1976), we held that a Florida death sentence could not stand because the advisory jury had been instructed not to consider non-statutory mitigating circumstances. The instant case is analogous; our decision in *Jurek v. Texas*, 428 U.S. 262 (1976), upholding the facial validity of the statute under which petitioner was sentenced to death is not dispositive of the question of whether his Eighth Amendment rights were violated because the sentencer was in effect instructed not to consider certain relevant mitigating evidence.

id. at —, 108 S.Ct. at 2338.

**Failure Of The Texas Court Of Criminal Appeals To Implement
The Assurance Made In Jurek:**

Almost twelve years have passed since *Jurek v. Texas* was decided and not only has the Texas Court of Criminal Appeals failed to define "criminal acts of violence" and "continuing threat to society" but it has also steadfastly refused to find error when, after timely motion by the defendant, the trial court has failed to instruct the jury on the meaning of these phrases. *Penry v. State*, 691 S.W.2d at 653-4, *Cannon v. State*, 691 S.W.2d 664, 677-8 (Tex. Cr. App. 1985), *King v. State*, 553 S.W.2d 105, 107 (Tex. Cr. App. 1977). In addition the Texas Court of Criminal Appeals has refused to find error, when after a timely motion by the defendant, the trial court has failed to instruct the jury that in answering the questions on the defendant's deliberateness and continuing threat to society they are to take into consideration all mitigating circumstances. *Cordova v. State*, 733 S.W.2d 175, (Tex. Cr. App. 1987), *Clark v. State*, 717 S.W.2d 910, 920 (Tex. Cr. App. 1986), *Stewart v. State*, 686 S.W.2d 118, 126, (Clinton, J. dissenting) (Tex. Cr. App. 1984).

Penry made a timely request for the following jury instructions:

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term deliberately.

* * *

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."

* * *

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.

* * *

OBJECTION 8: The next objection of the Defendant is that the Defendant objects to the submission of the verdict form permitting the jury to assess the death penalty because under the evidence produced in this cause said punishment would be cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and by Article One, Section Thirteen of the Texas Constitution, because among other reasons, it is excessive in that the punishment involves the unnecessary and wanton infliction of pain and is grossly out of proportion to the severity of the crime, especially in view of the mental illness and condition of the defendant.

* * *

OBJECTION 10: The next objection is the Defendant further objects to the Court's Charge because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances.

OBJECTION 11: The next objection to the Court's Charge,

* * *

is that fails to instruct the jury to the following effect: "you may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated.

XVII R. 2659 - 64. J.A. 210-2.

In accordance with agreement these objections were reduced to writing and signed by Penry's attorneys. (XVII R. 2664. J.A. 212). These objections to the Charge were overruled, (XVII R. 2664. J.A. 213), and the Texas Court of Criminal Appeals found no error, holding all the requested terms were to be given their common definitions. *Penry v. State*, 691 S.W.2d at 653-4. It should be

noted that in *Williams v. State*, 674 S.W.2d 315, 322 (Tex. Cr. App. 1984) the Texas Court of Criminal Appeals admitted that the term "deliberate" has a limited meaning.

The following Charge was then given the jury:

* * *

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the Jury's deliberations.

* * *

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

* * *

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

* * *

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

* * *

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

TR. 117 - 118A.³ J.A. 25-8.

At the punishment stage of his trial, Penry made the following argument:

I was somewhat amazed that Mr. Keeshan, [the District Attorney] when he told you that you ought to return a verdict that you could go home and be proud of. Is there any pride in taking the life of any person, much less a person which the evidence has shown here was an afflicted child at the age of nine. The records reflect that this boy had an afflicted mind at

³ The number after "TR." is the page number of the State Transcript filed as an exhibit in the United States Court of Appeals for the Fifth Circuit.

the age of nine and we can't get around that.

* * *

And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience.

* * *

—the law does give the right to take lives, but there is no law on earth if that life has been taken can restore that life. I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer.

* * *

They had one of their main witnesses here, Dr. Peebles, who's like a rubber stamp, who probably could not make a living out in the private practice of medicine, come in and say, he is of sound mind.

* * *

But now, he comes in here and he predicts that this boy in all reasonable probability will continue to get into trouble. That may be true. But, a boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of you juror's minds that there is something definitely wrong, basically, with this boy. And I think there is not a single one of you that doesn't believe that this boy had brain damage as they found it at the University of Texas, when they ran those tests and formed those conclusions. Ladies and gentlemen of the jury, if you go out and give this boy the death penalty—One of the objects of punishment is to deter others from committing similar offenses. That is supposed

to be it, but what do we have?

* * *

But ladies and gentlemen, you also have your conscience and your faith as Christians to still remember that you should not take that which cannot be restored. And I say to you, you have heard the evidence. You are honorable people, and I think that Mr. Keeshan was in error when he told you. "I want you to render a verdict that you can be proud of."

XVII R. 2683-7, J.A. 222-4.

The state then countered this plea for jury nullification by arguing:

I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is to on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case because, ladies and gentlemen, I submit to you we've met our burden.

XVII R. 2689-90, J.A. 225-6.

Penry was permitted to argue all the mitigating circumstances to the jury, but, the Court refused to instruct the jury as to where or how mitigating circumstances were to be applied in deciding the three special issues. Penry could only suggest to the jury that if they did not believe a mentally retarded person should get the death penalty they should pick one special issue and vote "no" even if the State had proven the answer should be "yes." That is, Penry could only suggest jury nullification of the law. As

the Court of Criminal Appeals tacitly admits in *Blansett v. State*, 556 S.W.2d 322, 327 n.6 (Tex. Cr. App. 1977), jury nullification is the only way all mitigating circumstances can be taken into consideration by the Texas death penalty statute. See also *Granviel v. Estelle*, 655 F.2d 673, 676 (5th Cir. 1981). Unless it is assumed Texas jurors will violate their oath to follow the law as given by the trial judge, having to depend on jury nullification places an intolerable burden on Penry. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, 428 U.S. at 271. There is no reason to believe that Texas juries will not do as the judge did in *Eddings v. Oklahoma*, supra, and follow the law as they understand it by reading the charge and ignoring any evidence that did not directly relate to the answering of the three issues given in the jury instructions. This is especially true since this is precisely what the state in its final argument, told the jury they were required to do. XVII R 2688 - 90. J.A. 225-6.

The rationale used by the Texas Court of Criminal Appeals in holding no special instructions on mitigating evidence is required was discussed in *Cordova v. State* as follows:

Our understanding of both *Eddings* [455 U.S. 104], supra, and *Lockett* [438 U.S. 586], supra, is that the Supreme Court did *not* mandate that a prospective juror must give any amount of weight to any particular fact that might be offered in mitigation of punishment, nor has our research to date revealed where this Court has ever laid down such a requirement. We believe that when properly read, *Eddings*, supra, and *Lockett*, supra, merely held that the fact-finder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the

special issues. The decisions of the Supreme Court, and of this Court, do not, however, require an affirmative instruction that the fact-finder *must* give any specified weight to a particular piece of evidence, as appellant's counsel appears to contend. The amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to "the range of judgment and discretion" exercised by each juror. See *Adams v. Texas*, supra, 448 U.S. at 46. Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.

* * *

Although the issue has been presented in many different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme, and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations. As previously pointed out, we find nothing in either *Eddings*, supra, or *Lockett*, supra, that would mandate the giving of a general or special instruction on mitigating evidence. E.g., *Demouchette v. State*, 731 S.W.2d 75 (Tex. Cr. App., No. 69, 143, September 24, 1986). Also see *Quinones v. State*, 592 S.W.2d 933, 947 (Tex. Cr. App. 1980), in which this Court held that no such affirmative instruction was necessary because "The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required."

733 S.W.2d at 189-190.

The above discussion must be considered along with the fact that Penry's jury, over objection, (TR. 48, J.A. 3-4) was required to take the oath § 12.31(b) Texas Penal Code;

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

The oath is given, even though no juror that refuses to take the oath will be disqualified. However, the jurors are not informed of this fact. *Granviel v. State*, 723 S.W.2d 141, 154-5 (Tex. Cr. App. 1986), *Penry v. State*, 691 S.W.2d 636, 656-7.

Although the argument in *Granviel v. State* was directed at the giving of the above oath, the giving of this oath should also be considered in the light of the Texas Court of Criminal Appeal's refusal to instruct the jury on the consideration of mitigating evidence. *Granviel v. State* argued against giving the oath as follows:

Although the State has stopped questioning jurors about the oath required under 12.31(b) and therefore no one is excused for failure to take the oath (because they are not told they can avoid taking the oath), the harm attendant to administering the oath is still present. It does not make much sense to prevent some one from being excused for failure to take the oath because to do so would deprive the accused of a fair and impartial jury but then to allow the trial court to require the jury swear an oath not to let the imposition of the death penalty affect their deliberations. The oath not only violates the spirit of *Adams v. Texas*, supra, but also violates the tenets of *Edmund [sic] v. Florida*, supra, [458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140] in that it forces the jury to swear not to consider [sc. allow?] their feelings about the death penalty to affect their deliberations nor does the oath allow the jurors to consider mitigating evidence in determining whether to answer the questions yes or no. By giving the oath, the trial

court has forced the jury to consider only the evidence which goes directly to the answering of the questions and to ignore the juror's feelings and arguments against the death penalty.

supra, at 154-5.

This argument was rejected by the Texas Court of Criminal Appeals. *supra* at 155-6.

Having the jurors take the oath in § 12.31 (b) Texas Penal Code restricts consideration of mitigating evidence more fully than the jury instruction in *California v. Brown*, — U.S. —, 107 S.Ct. 837 (1987) that was narrowly upheld by this Court. Justice O'Connor joined the majority opinion by Chief Justice Renquist and filed a concurring opinion in which she discussed her reason for concurring in the judgment and opinion of the Court stating:

In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

* * *

Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion.

id at 841.

Because it is open to the California Supreme Court to determine on remand whether the jury was adequately informed of its obligation to consider all of the mitigating evidence introduced by the respondent, I concur in the judgment and opinion of the Court.

id at 842.

Other indications that the Texas Court of Criminal Appeals is failing to define terms in the special issues of Art. 37.071 in a manner that allows consideration of all mitigating evidence are found in *Gardner v. State*, 730 S.W.2d 675 (Tex. Cr. App. 1987) and *Drew v. State*, 743 S.W.2d 207, (Tex. Cr. App. 1987). In *Gardner* a potential juror during voir dire was questioned on whether having found a person had intentionally killed someone she would automatically answer question No. 1, "yes." After the potential juror first said she would, the state on cross-voir dire got her to say she would not, after which the trial judge cut off further questioning. 730 S.W.2d at 685 - 688. The Court of Criminal Appeals found;

A venireman who fails to perceive a difference between "intentional" and "deliberate . . ." will certainly have problems reconsidering guilty stage evidence for its probativeness toward special issues, or for that matter, considering any new evidence presented at the punishment phase with the requisite degree of impartiality.

Judging from its final pronouncement, the trial court was apparently of a mind that it is "entirely impossible" that any reasonable juror would fail to discern a difference between the statutory terms. That is hardly a tenable position in view of the fact that at least four current members of this Court would favor submitting a requested jury instruction which would instruct jurors, *inter alia*, that "the word 'deliberately' has a meaning different and distinct from the 'intentionally' as that word was previously defined in the charge. . .

id at 689.

The Texas Court of Criminal Appeals in *Lane v. State* 743 S.W.2d 617, 628 n.7, (Tex. Cr. App. 1987) admitted the term "deliberate" needs to be defined stating,

V.T.C.A., Penal Code Sec. 6.03(a) sets out:

"A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or *cause the result*. (emphasis added) It seems appropriate to comment there on how beneficial it would be to this Court in resolving voir dire points of error for the Legislature to accept its responsibility, and define the term "deliberately" as it is set out in Art. 37.071(b)(1)."

The difficulties in distinguishing the difference between "deliberate" and "intentional" is further illustrated by the fact that as late as June 29, 1988 these words were interchanged in an opinion of the Texas Court of Criminal Appeals. *Hernandez v. State* ____ S.W.2d ____, No. 69, 649 slip opinion p. 3 (Tex. Cr. App. June 29, 1988). It may be argued that Penry's mental retardation could have been considered by the jury in answering Special Issue no. 1. Given the state of confusion that exists over the distinction, if any, between the meaning of "intentional" and "deliberate", that Penry's request that the term "deliberate" be defined by the Court was denied (XVII R. 2664, J.A. 213.), and that the jury had already found Penry acted intentionally when finding him guilty of capital murder; Special Issue no. 1 was inadequate as a means for the jury to take into consideration Penry's mental retardation as a factor mitigating against the sentence of death. Only when a defendant is so retarded that the defendant is incapable of acting deliberately could Special Issue no. 1 adequately encompass retardation as a mitigating factor.

In *Drew v. State*, 743 S.W. 2d 207, 211 (Tex. Cr. App. 1987) the Texas Court of Criminal Appeals held that a potential juror that would not answer Question No. 2 "yes" unless the state proved that the future dangerousness involved a danger to human life, could not

follow the law stating; "Although the phrase 'criminal acts of violence that would constitute a continuing threat to society' is not defined in the Code of Criminal Procedure, there is nothing in our case law to limit this portion of Article 37.071(b)(2), *supra*, to future murders." In this opinion, the Texas Court of Criminal Appeals held that a potential juror who states he would consider it a mitigating factor if the State failed to prove future dangerousness to human life could be excused for cause.

In the plurality opinion in *Hernandez v. State* Judge Teague addressed the issue of jury discretion in Texas capital cases stating,

Unlike criminal juries generally, a capital jury is never called upon to assess punishment. In fact, nobody assesses punishment in a capital case. The law has pre-determined what the punishment will be depending only on certain conditions. The jury, as factfinder, only determines whether those conditions exist. The judge then pronounces sentence as the law requires. Neither is vested with any discretion in this regard. Indeed, the discretion to execute or merely incarcerate one convicted of capital murder was purposefully taken from judge and jury alike by the Legislature of this State in order to meet the perceived constitutional requirements of *Furman v. Georgia*, 408 U.S. 238.

The only discretion left to jurors is in the mitigating weight which they may assign to relevant evidence bearing upon the special issues.

____ S.W.2d at ____, slip opinion p. 11 - 12.

The failure of the Texas Court of Criminal Appeals to implement the assurance made in *Jurek* has rendered it impossible for the jury to give effect to all the evidence that mitigates against the death penalty. This is particularly true when the mitigating evidence is mental retardation and an abused childhood.

The Dicta In Circuit Judge Reevely's Opinion Below:

This concern expressed by Justice O'Connor concurring in *Franklin* was addressed in the Fifth Circuit opinion by Circuit Judge Reevely in *Penry v. Lynaugh*. After pointing out that,

Penry objected to the jury charge. He complained that the court failed to define "deliberately," "probability," "criminal acts of violence" and "continuing threat to society". He also objected that the court failed to instruct the jury to weigh aggravating and mitigating circumstances and failed to authorize a discretionary grant of mercy based on the existence of mitigating circumstances.

832 F.2d at 920, J.A. 292-2.

Circuit Judge Reevely discussed the Eighth Amendment problems created by failure to give the jury the requested charge,

The jury was allowed to hear all evidence that might mitigate the culpability of Penry's deeds or his person. The jury could then consider (i.e. *think about*) the bearing of all the evidence, aggravating and mitigating, upon the ultimate question of whether Johnny Paul Penry should be put to death. If, however, that consideration should lead to the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more. The court, following Texas law, ends the matter and orders death. It is difficult to see how this procedure accords with some of the Supreme Court's writings on the Eighth Amendments' mandate of individualized application of all mitigation along with aggravation in the sentencing decision.

832 F.2d at 920, J.A. 293.

We read the Court's command that the sentencer not be precluded from "considering" any mitigating circumstances to mean that the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. See *Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44, 77 L.Ed.2d 235 (1983). It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision.

* * *

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to *decline to impose the death penalty*"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

* * *

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

The evidence is similar to that in *Hitchcock* and *Eddings*. Those cases arguably teach us that it must be considered by the sentencer. Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence of his background and child abuse, logically, does not. The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

832 F.2d at 924-925, J.A. 301-4.

Without instructions on the necessity for considering all mitigating evidence and without proper definitions of term it is simply impossible for Texas' special issues to encompass all mitigating circumstances. In *Jurek v. Texas*, this Court upheld the three special issues on the assumption that proper definitions would be forthcoming. 428 U.S. at 272 (1976) None of the terms have been given definitions by the Texas Court of Criminal Appeals and no instructions on consideration of all mitigating evidence is ever given. The Texas Court of Criminal Appeals having defaulted on its promise, the Texas statute should be held a violation of the Eighth Amendment to the United States Constitution as applied. See *Godfrey v. Georgia*, 446 U.S. 420 (1980.) With jury nullification the only way for all the mitigating evidence to be considered, too great a burden was placed on Penry. By restricting the jury to answering the three statutory questions without any definitions or instructions on consideration of all mitigating circumstances or informing the jury they could vote no on one or both special issues should they believe the death penalty was not appropriate, Penry's jury was just as effectively precluded from consideration of all mitigating evidence as was the Florida jury in *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987).

**EXECUTION OF A MENTALLY RETARDED PERSON WITH
THE REASONING ABILITY OF A SEVEN YEAR OLD IS
CRUEL AND UNUSUAL PUNISHMENT:**

In *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595 (1986) this Court held that an insane person cannot be executed and in *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988) this Court held that a defendant who was 15 years old at the time he committed the crime cannot be executed. Execution of a person as mentally

retarded as Penry is a parallel issue. Accordingly, the holding in these two cases provide support for the proposition that to execute a person as retarded as Penry would be cruel and unusual punishment.

Mental retardation is not the same type of mental defect as insanity. Mental retardation is defined as:

[S]ignificantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

GENERALLY INTELLECTUAL FUNCTIONING is operationally defined as the results obtained by assessment with one or more of the individually administered standardized general intelligence tests developed for that purpose.

SIGNIFICANTLY SUBAVERAGE is defined as IQ of 70 or below on standardized measures of intelligence. This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.

DEFICITS IN ADAPTIVE BEHAVIOR are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales.

DEVELOPMENTAL PERIOD is defined as the period of time between conception and the 18th birthday. Developmental deficits may be manifested by slow, arrested, or incomplete development resulting from brain damage, degenerative processes in the

central nervous system, or regression from previously normal states due to psychosocial factors.

Classification in Mental Retardation, 1983 Revision, (Grossman, M.D., Ed.).

Since insanity and mental retardation are two different phenomena, the reasons why execution of an insane person and a mentally retarded person is cruel and unusual, are different. An insane person cannot be executed, because, to execute someone that is so out of touch with reality that he is not aware of why he is being executed is cruel and unusual punishment. *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595, (1986). The reason for not executing a mentally retarded person is that he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his crime. Mental retardation is a factor that mitigates against assessing the maximum punishment of death. Standard 7-9.3, *American Bar Association Standard for Criminal Justice*. Accordingly the test for determining if a mentally retarded defendant can be executed should be whether because of mental retardation the defendant has a deficit in adaptive behavior that significantly reduces his ability to learn from mistakes.

The Eighth Amendment to the U.S. Constitution assures that the State's power to punish is exercised within the limits of civilized society and central to any determination of whether punishment is cruel and unusual is the use of contemporary standards. *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595, 2600 (1986), *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976). Contemporary standards can be determined by legislative enactments, court opinions, public opinion surveys and the position taken by recognized professional organizations. For at least the last 100 years Texas by statute has prohibited the execution of a person that was under 17

years of age at the time of the offense. Tex. Penal Code Ann. § 8.07(d), *Ex parte Walker*, 13 S.W. 861 (1890). This Court in *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595 (1986) held that the Eighth Amendment prohibits the execution of the insane. In so doing this Court used as its starting point the common law principal that, "[I]diots and lunatics are not chargeable for their own acts, . . ." *id* at 2600. Under the common law,

[An idiot is] a person who cannot account or number twenty pence, nor can tell who is his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.

Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 416 (1985).

A recent survey commissioned by Amnesty International found that in Florida 71% were against a mental retarded defendant being put to death while only 12% were in favor. ROA between pages 63 and 64. J.A. 279. A study by Center for Public and Urban Research, Georgia State University obtained similar results. (See Rule 28 (J) Authority filed in the Fifth Circuit, J.A. 283.) January 10-12, 1986 at the Council Meeting of the American Association of Mental Deficiencies⁴ (AAMD) the Council unanimously endorsed the following resolution:

The imposition of capital punishment on individuals with mental retardation raises troubling legal and moral issues. The AAMD supports legal reforms in

⁴ The A.A.M.D. has changed its name to American Association on Mental Retardation.

the States that comport with the standard of civilized Common Law nations.

24 Mental Retardation, No. 1 P.47 ROA 126, J.A. 280.

Following the execution of Jerome Bowden in Georgia June 24, 1986 the AAMD, a professional association that has nearly 10,000 members, issued a press release that severely condemned his execution. ROA 128A, J.A. 281-2. Following this execution the Georgia legislature passed a statute that prohibited the execution of the mentally retarded. O.C.G.A. § 17-7-131. On April 15, 1988, the Texas House of Representatives, Committee on Criminal Jurisprudence held its initial hearing on a similar law. It is highly probable that legislation to prohibit the execution of a mentally retarded person will be introduced at the next session of the Texas Legislature. (Personal communications with John Valdez, Assistant to the committee chairman, Juan J. Hinojosa. See also *Death Penalty Bar urged for Retarded*, Austin American Statesman, April 16, 1988, at B-3).

This Court has found that a person who was 15 years old at the time he committed the crime could not be executed. *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988). In concluding that to execute a juvenile that was 15 years old at the time the crime was committed was cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution the plurality opinion found that,

"Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on one such as petitioner who committed a heinous murder when he was only 15 years old. *Enmund v. Florida*, 458 U.S. at 797. In making that judgment, we first ask whether the juvenile's culpability should be mea-

sured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders "measurably contributes" to the social purposes that are served by the death penalty. *Id.*, at 798.

It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." *California v. Brown*, 479 U.S. 538, ____ (1987)(O'Connor, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating defendant's youth as a mitigating factor in capital cases:

"But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). *Eddings v. Oklahoma*, 455 U.S., at 115-116 (footnotes omitted).

To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

"Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to the victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms

than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.*, at 115.

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

— U.S., at ____, 108 S.Ct. at 2698-9.

In Oklahoma, the combined effect of the death penalty statute that set no minimum age and the statute for certification of a juvenile as an adult was that an offender that was 15 years old at the time of the offense could be sentenced to death. In *Thompson v. Oklahoma*, Justice O'Connor concurred with the plurality opinion reasoning since there was no indication that when these statutes were passed the Oklahoma legislature was aware of this result, to execute Thompson would be cruel and unusual punishment. — U.S. ____, 108 S.Ct. at 2710-11 (1988). The Texas legislature is in the process of considering whether the execution of a mentally retarded offender should be prohibited. Thus as soon as early Spring 1989 there could be proof that the Texas Legislature believes that under developing standards of civilized society execution of a mentally retarded offender should be prohibited.

Even if the Texas legislature passes such a statute, Penry will still be under a sentence of death. The Texas Court of Criminal Appeals has held that it is a violation of

the separation of powers provided for by the Texas Constitution for any branch of the government, other than the executive branch, to modify a sentence once the courts have acted. *Ex Parte Giles*, 502 S.W.2d 774, 786 (Tex. Cr. App. 1973). What would the situation be if the Governor of Texas chose not to commute Penry's sentence? If the Texas Legislature should prohibit the execution of a mentally retarded offender would it then be cruel and unusual punishment to execute Penry when to execute him prior to the legislature acting it would not?

What would the situation be if, as happened in the State of Maryland, one of the houses of the Texas legislature overwhelmingly passed a bill to prohibit the execution of the mentally retarded but, for reasons not related to the merits of the bill, the other house did not consider the bill? (See, *In the Assembly*, The Sun, Baltimore, Maryland, March 25, 1988 and *Legislature*, Schaefer Close Mercurial '88 Session, The Sun, Baltimore, Maryland, April 12, 1988, at 4A, Col. 3). Would it be alright to execute Penry when if both houses passed the bill it would not?

It is submitted that what is cruel and unusual punishment does not change. It is the yard stick that is used to measure what is cruel and unusual punishment that changes with the developing standards of civilized society. The question then is just how precise must this yard stick become before cruel and unusual punishment can be recognized? Should the Texas Legislature prohibit the execution of a mentally retarded offender this act alone would greatly increase the precision of the yard stick used by Texas. The question presented to this Court by Penry is whether or not the yard stick is at this time precise enough for the Court to find the execution of Penry would be cruel and unusual punishment.

At the competency hearing, Jerome B. Brown, Ph.D. summarized the contents of the various medical records

entered into evidence as Defendant's exhibits 3, 4, 6, 7 and 8.⁵ The record from John Sealy Hospital, where in 1965 Penry's full scale IQ was 56 (VI R. 556, J.A. 34), were summarized as follows,

I think several of the things are important. First of all, from a very early age, this man has been documented as being difficult to control. He has very great difficulty controlling himself, and behaving in the usual situations like other children. He has—I think the idea of being able to control and discipline himself is important. The short attention span, the impulsivity has been documented from an early age in this young man.

* * *

[E]ven in these early records, we are seeing indications that his ability to conform to the regular way of doing things to discipline himself, to follow instructions, to carry out some sort of plan is severely impaired. He simply cannot do what he's told to do for very long. The word impulsive means that he's prey to his own urges or impulses at the moment. He doesn't have the ability to say, "wait a minute, I'd better not do this. I better wait or better not do it at all." The short attention span is important. This means that he can't attend to things for any length of time. He can't focus. He can't concentrate.

VI R. 558 - 559, J.A. 35.

The record from Mexia State School, where in 1968, Penry's full scale IQ was 51 (VI R. 560, J.A. 36.), were summarized as follows:

[T]here are a number of things I think that are important. First of all, in 1973, when this hospitalization took place, he was diagnosed as psychotic. This

⁵ These exhibits are in the trial record filed as an exhibit in the United States Court of Appeals for the Fifth Circuit.

means that something had happened to him, such that his ability to see reality or see the world around him as other people see it was severely impaired. He was hearing things and seeing things and developed a number of paranoid ideas about being attacked that were not based on any kind of reality, and he was—this was one of the main reasons for his hospitalization at that time. Again, the evaluation showed strong evidence of brain damage. His visual motor coordination was extremely poor. His motor control is quite poor. The evaluation by Dr. Bell indicates that he was impressed to the degree that he did not feel like he could function by himself at all in a social setting. That he would be subject to influence and manipulation by people more intelligent or sophisticated than he was. He is unemployable. He could only perform simple tasks. He felt that he would be exploited in something like a prison setting. He would be subject to attack by other inmates. He felt that he could not control himself when he was upset or under stress due to his lack of intelligence and his inadequate personality development. He is only able to understand simple words and phrases. His thinking is extremely concrete and on a superficial, simple level.

* * *

That means that he has only a very black and white kind of understanding of what's taking place. He has no ability to understand subtleties or nuances or to understand the implication of what's going on around him except in a very, very simple way. It's a long history of being exploited by others, abused. I think those are the main points.

VI R 562 - 563, J.A. 37-8.

The records from Rusk State Hospital, where in 1973 Penry's full scale IQ was 63 (VI R. 564, J.A. 38.), were summarized as follows;

If you look at the nursing notes concerning his kind of day to day behavior on the ward, while he was there

at Rusk, you'll see that Johnny had a great deal of trouble taking care of himself there on the ward. He was prey to both his own impulses and also the other inmates. He was also fearful of them and felt that he would be hurt by them. There are several notes in there about that. It was obvious to me upon reading this it was difficult for the staff to tell when he was telling the truth and when he wasn't. That he was unreliable to them. For example, there is one note in here that says "it is to be noted that he might be telling the truth sometimes." So, the staff are confused about what he's saying. They seem to be perplexed as to what to do with him to help him. His behavior alternated between becoming difficult and obstreperous to being extremely complacent and approval seeking. He seemed to routinely do poorly, when he was released to go home for a visit. They couldn't even let him out long enough to go for a weekend furlough without him having some kind of difficulty like running away or becoming upset with his family in some kind of way. There are notes in here that he admits to doing things to the staff that he didn't really do in order so he wouldn't be picked on by them. They could coerce him into saying that he did things when he didn't do them. These are other inmates, in-patients would bully him.

VI R 565-566, J.A. 39.

The records from the Texas Rehabilitation Commission were summarized as follows:

I think the most important aspects of this is the intellectual evaluation again, which revealed the verbal IQ of 56, which is again mild to moderate range of mental retardation. The comments I think are relevant from the psychologist in the report in this case, and this was last year, 1979, I believe. He lacks the ability to apply any basic academic skills to his daily life activity. He has exhibited inappropriate reasoning and judgment and daily life activities. He has not mastered basic social skills, which would allow suc-

cessful participation in group activities. He is unable to function independent in the community and in gainful employment. He has exhibited an inability to conform to standards set by the community. His reading level is between the first and second grade. His spelling level is at the second grade. His arithmetic ability is in the early kindergarten grade. He is unable to read and write. He doesn't have any appropriate internal controls. He has poor vision. He cannot perform fine motor tasks. Very poor family background. His work history is essentially nil. He's been able to earn some money every now and then under the supervision of someone else. He—Well, again the history of exploitation of others, being victimized by others is revealed once again.

VI R. 566-567, J.A. 40.

Dr. Brown summarized his own observation as follows:

[I]n addition to the administration of psychological tests, I also interviewed him at length, but the tests I administered because of the past records, we have a fairly accurate documentation of the past difficulties he has and, so I didn't go into a lot of extensive testing that would be repetitive. What I tried to do was once again document his intellectual level, which my results again produced an IQ of 54, which is consistent with the other results. The particular mental age that I obtained for this man was 6 1/2. Now that means that he has the ability to learn and the learning or the knowledge of the average 6 1/2 year old kid. I administered a estimate of social maturity. This is kind of how well you can take care of yourself and how well you can function in the world around you. On this particular test, he did a little better. He was able to score at the 9 or 10 year old level. In other words, he knows how to get around the world about as well as the average 9 or 10 year old. Again, I administered a test of visual motor coordination and memory, which reflects the organic brain damage or the brain dysfunction that he has exhibited through his life. The results of the evaluation together with my interview

indicate that he is a very simple and limited person. His understanding of the world around him is very concrete, and in terms of time, he is pretty much oriented from one moment to the next. His understanding of history, for example, is only in terms of before and after. He is very limited in his ability to understand what is taking place, and has only a very simple and very general kind of understanding about what is taking place, for example, here today in the Courtroom.

VI R. 568-569, J.A. 40-1.

At the guilt or innocence portion of Penry's trial, Dr. Jose G. Garcia testified that on the basis of the reports he had reviewed from Penry's past medical records (these reports were introduced into evidence as Defendant's exhibits 3, 4, 6, 7 and 8 XVI R. 2125, J.A. 84) and his own examination of Penry that,

I'm referring to a brain disorder that affects an individuals' ability to use thinking, judgment and volition. That is, the free will is impaired to such a degree that such a person has difficulty exercising intelligent, reasonable judgment. In addition, a person who has this type of brain disease, brain defect, doesn't know how to learn from experience, and they, in fact, have no impulse control or extremely poor impulse control.

XVI R. 2129-30, J.A. 87.

[P]art of that has to do from the result of my examination of Mr. Penry and part of it has to do with the examinations that have been conducted by physicians, psychiatrists, psychologists, counselors, way back since 1965. That have again, and again, and again, come back with almost identical reports even though they did not, the way I understand it, have access to the previous reports, when they examined him, until after the in-take examination was completed. So that the scores, the examinations, have

almost been carbon copies, so that in itself tells us that there has been almost no change or no change whatsoever since 1965. And in my examination, I found strong clinical evidence that he continues to have the same symptoms that are compatible with an organic brain disorder.

* * *

[T]he type of language he uses is the type of language that is found in an individual who may have less than a first grade education level. The language is rather primitive, although the language may seem understandable to everyone else. Secondly, he doesn't even know how to spell words as simple as dog and cat. When he was asked to spell the word "cat" he spelled c-a-r. And he printed. He spelled the word "dog" as saying d-i-d-y. I asked him how many days were in a week, and he said he did not know the days of the week, but when I asked him what day it was that the examination was being conducted, he said he had been told it was a Monday. The questions had to do with trying the present questions in a manner that were understood by him. So, I asked when is pay day, because I understand that he was attempting to work and he remembered it was Saturday. And he remembered that Sunday is the day to go to church, but the other days he did not recall or knew what they were. He told me that there were four nickels in a quarter and that he attempted to sound very intelligent. When I asked him how many months were in a year, he said "most people said there were six, but I think there are more than that." How many? "There are eight." And he appeared quite sincere in giving that information. Then I asked him to give me the names of the months. He proceeded to mention February, August, July, September, November, June, and then repeated September. When I asked him why he repeated September, he had forgotten that he had already mentioned September.

Just as a juvenile that was 15 years old at the time he did the crime is less culpable than an adult so to is a mentally retarded person. A mentally retarded person may have had more experience than a juvenile but because of the deficit in adaptive behavior that is one of the characteristics of retardation, Penry is unable to learn from this experience. Because of his retardation, he does not have the perspective and judgement expected of a person of normal intelligence. Penry has a history of being susceptible to influence, he is more impulsive and less self-disciplined than that of a person of normal intelligence. He has little to no capacity to control his conduct and to think in long-range terms. In addition, the record in Penry's trial documents the failure of Penry's family, the Texas Mental Health - Mental Retardation System and the Texas Prison System to properly treat a mentally retarded person with the reasoning capacity of a 6 to 7 year old.

Although the legislatures of the various states are only now starting to consider the issue of execution of a mentally retarded person, public opinion surveys indicate there is an even stronger sentiment against execution of a mentally retarded person than there is against executing a person under the age of 18 at the time of the offense. ROA between 63 and 64, J.A. 279. In addition, execution of a mentally retarded person is strongly opposed by the professionals in the field of mental retardation. The American Bar Association Standards are against imposition of the maximum punishment when the offender is mentally retarded. This Court has decided that a juvenile who was 15 years old should not be executed because one of that age does not have the maturity, judgment, and perspective of an adult and they are more vulnerable, impulsive, have less capacity to control their conduct and think in long-range terms. A mentally retarded person has these same problems. For these same reasons, a mentally

retarded person with the reasoning capacity of a seven year old should not be executed. To execute Penry would be cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

CONCLUSION

For the above reasons, this cause should be remanded with instructions that Penry's sentence of death be vacated, as cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

Respectfully submitted,

CURTIS C. MASON

Attorney for Petitioner.

Staff Counsel for Inmates

P.O. Box 99

Huntsville, Texas 77342-0099

(409) 295-6371 Ext. 1370

JOHN W. TERRY,
Petitioner

WILLIAM S. LAMSON, Director,
Texas Department of Corrections,
Respondent

IN SUPPORT OF PETITIONER TO
THE TEXAS COURT OF APPEALS
AND THE FIFTH CIRCUIT

AMICUS FOR AMICUS CURIAE
HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

STANLEY C. SCHNEIDER
11 GREENWAY PLAZA
HOUSTON, TEXAS 77046

ATTORNEY FOR
AMICUS CURIAE

TABLE OF CONTENTS

List of Authorities.....	ii
Identification of Amicus Curiae.....	2
Statement of Amicus Curiae.....	3
Arguments and Authorities.....	4
Background.....	6
"Mitigating Evidence" that Can Send a Defendant to Death Row.....	10
The Internal Tension in Death Penalty Jurisprudence.....	11
Evidence of Mental Illness: A Texas Two- Edged Sword.....	18
<u>Wainwright v. Witt</u> : Following the Juror's Oath.....	22
Conclusion.....	25
Certificate of Service.....	29
Affidavit of Juror.....	Appendix A

LIST OF AUTHORITIES

Cases

<u>Adams v. Texas</u> , 448 U.S. 38 (1980).....	22
<u>Booth v. Maryland</u> , ___ U.S. ___, 107 S. Ct. 2529 (1987).....	16, 28
<u>California v. Brown</u> , ___ U.S. ___, 107 S. Ct. 837 (1987).....	15, 28
<u>Franklin v. Lynaugh</u> , ___ U.S. ___, 108 S. Ct. 2320 (1988).....	4
<u>Hitchcock v. Dugger</u> , ___ U.S. ___, 107 S. Ct. 1826 (1987).....	17
<u>Jurek v. State</u> , 522 S.W.2d 934 (Tex. Crim. App. 1975), <u>aff'd</u> 428 U.S. 262 (1976).....	18
<u>Jurek v. Texas</u> , 428 U.S. 262 (1976).....	26
<u>McCleskey v. Kemp</u> , ___ U.S. ___, 107 S. Ct. 1756 (1987).....	16, 28
<u>Penry v. Lynaugh</u> , 832 F.2d 915 (5th Cir. 1987).....	6, 9
<u>Penry v. State</u> , 691 S.W.2d 636 (Tex. Crim. App. 1985), <u>cert. denied</u> , 474 U.S. 1073 (1986).....	7, 9
<u>Stewart v. State</u> , 686 S.W.2d 118 (Tex. Crim. App. 1984), <u>cert. denied</u> , 474 U.S. 865 (1985).....	20

<u>Wainwright v. Witt</u> , 469 U.S. 412 (1985).....	22
--	----

Statutes and Constitutions

TEX. CODE CRIM. PROC. ANN. art. 37.017.....	passim
U.S. CONST. amend VIII.....	6, 14, 28
U.S. CONST. amend XIV.....	28

Other Authorities

<u>Lewis, et. al., Neuropsychiatric, Psycho-educational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States</u> , 145 Am. J. of Psychiatry 584 (1988).....	passim
--	--------

NO. 87-6177

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JOHNNY PAUL PENRY,
Petitioner

VS.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,
Responent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE
HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

TO THE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

COMES NOW AMICUS CURIAE HARRIS COUNTY
CRIMINAL LAWYERS ASSOCIATION, by and
through its attorney Stanley G. Schneider
and pursuant to Rule 36.1, it would
respectfully show the Court as follows:

IDENTIFICATION OF AMICUS CURIAE

The Harris County Criminal Lawyers Association [hereinafter the Association] is an unincorporated association of attorneys who practice criminal law in the courts of Harris County, Texas. Many of the members of the Association have represented persons charged with capital murder.

All parties have given the Association permission to file this brief. A copy of the letters of permission have been filed with the Clerk of this Court.

The Association appears for Petitioner.

STATEMENT OF AMICUS CURIAE

The Association believes that the Texas capital punishment system embodied in TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional because it restricts the types of evidence that a jury can consider in mitigation of punishment. In addition, attorneys cannot as a practical matter introduce evidence which in other states would be the most compelling evidence in mitigation because that evidence would make it more likely that the defendant would be sentenced to death because of the unique special issue system used in Texas death penalty cases.

Under the Texas death sentencing system, if the jury finds affirmative answers to the special issues submitted to it, the judge is required to sentence the defendant to death -- even if all 12 jurors

believe that sufficient mitigating evidence or circumstances were presented warranting sentencing the defendant to life in prison rather than death.

ARGUMENTS AND AUTHORITIES

Last Term, in Franklin v. Lynaugh, ___ U.S. ___, 108 S. Ct. 2320 (1988), this Court held that a defendant in a Texas capital murder case has no Eighth Amendment right to instructions allowing a jury to consider "residual doubts" as to the defendant's factual guilt. The Court also held that the jury was able to consider a defendant's behavior in confinement prior to trial in mitigation.

The Association believes that based on the facts of Franklin, the Court had no option but to affirm the denial of habeas corpus relief. The record is clear that

Article 37.071 allowed the jury to consider all of the mitigating evidence presented by Franklin at his trial.

However, a majority of the Court held either that Article 37.071 violates the Eighth Amendment, (Stevens, J., dissenting), or that the statute might be unconstitutional if a defendant presented evidence that could not be considered in mitigation by a jury in answering the special issues in Article 37.071 because it was either irrelevant to the special issues or could not be considered in mitigation while answering the special issues (O'Connor, J., concurring).

The Association believes that Article 37.071 as applied by the Texas Court of Criminal Appeals is unconstitutional for two reasons: first because it does not provide a vehicle for the jury to give

effect to all mitigating evidence and second, because it fails to give a definition of deliberate in connection with the answer to Special Issue Number 1. This brief will be limited solely to the question of whether Article 37.071 unconstitutionally limits the consideration by juries of all mitigating evidence and hence is a violation of the Eighth Amendment.

Background

The facts of the instant case, as reported by the Court of Appeals, indicate that a jury could have found that Petitioner suffered from mental diseases or defects including some degree of mental retardation. Penry v. Lynaugh, 832 F.2d 915, 917 (5th Cir. 1988). All three psychiatrists who testified at Petitioner's

trial, including two who testified for the State, agreed that Petitioner's mental problems manifested themselves, among other ways, in an inability to learn from his mistakes. Id. The psychiatrists were, however, unable to agree on whether Penry's mental limitations were caused by birth trauma or by childhood environmental factors such as beatings and being locked in his room for extended periods. Id.

Petitioner's inability to learn from his mistakes is a significant factor in light of both his prior criminal record and Special Issue Number 2, whether Petitioner would constitute a continuing threat to society. (As the Court of Criminal Appeals noted in its opinion, at the time of the instant offense, Petitioner was on parole for a previous rape conviction. Penry v. State, 691 S.W.2d 636, 653 (Tex. Crim. App.

1985), cert. denied, 474 U.S. 1073 (1986).

The Association would submit that Petitioner's mental disease and defects -- as well as the mental diseases and defects of uncounted others on Death Row in Texas -- constitute a mitigating factor that a jury could find outweighs aggravating factors and hence constitute evidence that a properly instructed jury could to return a sentence less than death. However, the structure of the Texas death penalty scheme prevents such an outcome. In fact, the structure of the Texas death penalty sentencing scheme makes a death sentence more likely given the evidence of mental disease or defect because it would be evidence that the defendant would be a continuing threat to society.

In the instant case, the Court of

Criminal Appeals cited Petitioner's "failure to reform himself" as one factor in finding sufficient evidence to support a "Yes" answer to the special issue on future dangerousness. Id. at 653. Yet, the psychiatrists who examined him agreed that an inability to learn from his mistakes was a symptom of his mental disease or defect. And, as the Court of Appeals noted, that mental disease or defect was caused either by birth trauma or by childhood experiences that were not of Petitioner's doing. 823 F.2d at 917.

The Court of Criminal Appeals and the Court of Appeals for the Fifth Circuit cannot both be constitutionally correct. Petitioner's mental defect cannot at the same time be a factor in reducing his moral guilt and a factor in condemning him to death; at least without the statute

providing a means for the jury to consider weighing the mitigating value of that evidence.

**"Mitigating Evidence" that Can Send
A Defendant to Death Row**

In a recent edition of the American Journal of Psychiatry, a study was published that studied the mental health, neuropsychiatric, psychoeducational and family histories of 40 percent of the juveniles on Death Row. The study involved all 14 of the juveniles under sentence of death in four states. See generally, Lewis, et. al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 Am. J. of Psychiatry 584 (1988). The study indicated that uniformly, juveniles on death row have a history of brain damage,

mental illness and abuse -- both physical and sexual.

The study shows that eight of the 14 condemned juveniles had suffered severe head injuries. Nine had neurological abnormalities including abnormal head circumferences or a history of seizures. Seven were psychotic at the time of the examination or had been diagnosed as psychotic in earlier childhood. An additional four had histories consistent with severe mood disorders. The remaining three subjects experienced periodic incidents of paranoia, at which time they often assaulted their perceived enemies.

Only two of the 14 had full scale I.Q.s over 100.

The study also indicated that 13 of the 14 were physically abused as children,

five were sexually abused and 13 of the 14 had histories of family violence or mental illness. The incidents of physical abuse included being hit on the head with a hammer by a stepfather, being seated on a hot burner by a stepfather, being hit on the head with a board by a father so severely that teeth were broken, being beaten by a father with boards and bullwhips and one who was beaten and stomped by an older brother, whipped by his mother and kicked in the head by a relative.

Petitioner was not a juvenile at the time of the offense for which he was sentenced to death. Texas does not allow the execution of a person for a crime committed before his 17th birthday. But, the study is relevant for two reasons. First, the study defined juveniles as those

who committed crimes before their 18th birthdays. So, at least theoretically Texans could be included in the study. Second, it is safe to assume that if all persons under death sentences for crimes committed before their 18th birthdays have such histories, then at least a high percentage of persons who commit capital murders after their 18th birthdays have similar histories.

The study concludes:

Our data, based on evaluations of approximately 40% of the juvenile death row population, indicate that juveniles condemned to death in the United States are multiply handicapped. They tend to have suffered serious CNS (central nervous system) injuries, to have suffered since early childhood from a multiplicity of psychotic symptoms, and to have been physically abused.

Theoretically, all of the vulnerabilities described -- neurological impairment, psychiatric illness, cognitive deficits, and

parental abusiveness -- were potentially mitigating factors that, coupled with youthfulness, would have argued against the imposition of the death sentence.

Id. at 587.

Dr. Lewis and his colleagues would be wrong in Texas. Each of those factors which they believe to be mitigating are in fact aggravating factors in Texas because each of those factors make it more likely that the defendant would commit future crimes of violence.

The Internal Tension in Death Penalty Jurisprudence

As Justice O'Connor has noted, there is a tension between the two central themes of this Court's Eighth Amendment capital punishment jurisprudence: limiting the discretion of the sentencing authority "by clear and objective standards so as to produce nondiscriminatory application" and

the requirement that the sentencer be allowed to consider any relevant mitigating evidence regarding the defendant's character or background and the circumstances of the particular offense. California v. Brown, ___ U.S. ___, 107 S. Ct. 837, 841 (O'Connor, J., concurring). Justice O'Connor further noted that the decision to impose a death sentence is neither a purely rational nor a purely emotional decision. Rather, it should "reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." Id.

This Court has also held that while the Constitution requires states to limit narrowly a sentencing authority's power to impose the death penalty, they may not limit the ability to consider any evidence

that might cause the sentencer to decline to impose the death penalty. In determining whether to decline to impose the death penalty, the sentencer's discretion cannot be channeled. Rather, it must be allowed to consider all relevant information offered by the defendant. McCleskey v. Kemp, ___ U.S. ___, ___, 107 S. Ct. 1756, 1773-74 (1987). It follows directly that a jury or other sentencer must have the means to apply mitigating evidence as well as hear it. That is because the Constitution requires sentencing in capital cases to be individualized determinations of whether a particular defendant is to be executed and that determination must be based on the personal responsibility and moral guilt of the defendant, not on other factors. Booth v. Maryland, ___ U.S. ___, ___, 107 S. Ct.

2529, 2532-33 (1987).

This Court's unanimous decision in Hitchcock v. Dugger, ___ U.S. ___, 107 S. Ct. 1826 (1987), is highly relevant to the constitutionality of Article 37.071. In Dugger, the Court held that a death penalty was violative of the Eighth Amendment when the advisory jury was instructed not to consider -- and the judge who imposed the actual sentence did not consider -- a wide variety of mitigating factors not specifically authorized by statute. That sentence was vacated even though evidence of numerous mitigating factors was introduced before the jury.

Like the unconstitutional application of the Florida death sentencing system in Hitchcock, Article 37.071 operates in such a way as to allow all types of mitigating evidence to be introduced into evidence

while restricting the sentencer's ability to consider certain types in mitigation. See Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976).

Evidence of Mental Illness:
A Texas Two-Edged Sword

Since this Court tentatively approved the Texas capital punishment system in Jurek, a majority of the Court of Criminal Appeals has consistently held that Article 37.071 gives adequate guidance to juries in considering of mitigating evidence. Yet, as shown above, evidence of mental illness, family background and even brain damage leads to the conclusion that a person is likely to commit future acts of criminal violence.

Depending on one's perspective and focus, such evidence is at once damning and mitigating. It is this

very paradox that renders asking the jury questions only in the language of 37.071(b) constitutionally insufficient. The truth is that many vicious criminals suffered at the hands of irresponsible and unfit parents; common knowledge holds that many violent criminals were physically abused children and that the American crime rate rises and falls in direct proportion number of our citizens under 35. When we prosecute such a person and place in the jury's hands the decision of whether that person is to live or die, is it enough to protest that we have allowed him to adduce mitigating evidence, yet take no measure to ensure the jury's understanding of their role in regard to that evidence? I think not.

In sum, a defendant is entitled to jurors whose consideration of mitigating circumstances is not limited to whether that evidence does or does not indicate future dangerousness. The jury must not be precluded in law or in practice from according independent weight to factors that are mitigating but perhaps irrelevant to the probability issue of future dangerous conduct.

Stewart v. State, 686 S.W.2d 118, 124-26 (Tex. Crim. App. 1984), cert. denied, 474

U.S. 866 (1985) (Clinton, J.,
dissenting)(emphasis in original).

The instant case is a perfect example of what Judge Clinton was discussing. There is no doubt that Petitioner suffers from severe mental illness and defects, albeit not of sufficient severity to make him either incompetent to stand trial or insane. The facts in the instant case, as recounted by the Court of Criminal Appeals, show that Petitioner committed a brutal rape-murder and that there was little question of Petitioner's factual guilt.

Once the jury rejected Petitioner's insanity defense, his best hope for avoiding a death sentence was to convince the jury that his mental defects were sufficient to reduce his moral guilt below that necessary to justify a death penalty. Yet, Article 37.071 provided no vehicle for

that jury to mitigate punishment.

The Court of Criminal Appeals has placed defendants in capital murder trials in a Catch-22 situation. They either cannot introduce evidence of mental disease or defect because of the risk of an affirmative answer on Special Issue Number 2 or they introduce the evidence and hope the jury will violate its oath.¹ The Court of Criminal Appeals has consistently refused to require instructions on how a jury can mitigate punishment. Despite this paradox, the Court and the Legislature have simply not provided a vehicle to either

¹ The Court of Criminal Appeals has on several occasions vacated death sentences after finding insufficient evidence to support a "Yes" verdict to the special issue on future dangerousness. It has, however, never vacated a death sentence because the mitigating evidence outweighed the aggravating evidence.

focus a jury's attention on mitigating evidence or a vehicle for the jury to mitigate punishment if it so desires.

Wainwright v. Witt:
Following the Juror's Oath

This Court has held that a key factor in determining whether a prospective juror may be excluded for cause in a capital case is whether the juror can follow his oath. Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980). Simply put, if a juror cannot swear to follow the Court's instructions at the punishment stage of a capital murder trial, the State is entitled to challenge that prospective juror for cause.

In Texas, the practical effect of Witt is to make it impossible for a juror to exercise mitigation based on mental disease or defect if that mental disease or defect

also makes it more likely that the defendant will continue to commit crimes of violence. Consider the following hypothetical example as applied to Texas law:

A person commits an execution-style murder during a robbery. At the punishment stage of his trial, all parties agree that the defendant was able to deliberate and all parties agree that he is subject to fits of extreme anger due to irreversible organic brain damage. All parties also agree that the defendant received this organic brain damage when he was struck in the head by shrapnel from a Viet Cong mortar shell while he was serving in the U.S. Army. And, the evidence shows that the defendant won the Medal of Honor as a result of his actions during that shelling.

Applying those facts to Article

37.071, the defendant must be sentenced to death if the jury is to follow its oath. The facts show beyond a reasonable doubt that the murder was deliberate and that the defendant would be dangerous in the future. Even if all 12 jurors wished to sentence that defendant to life in prison, the judge would be required to assess a death penalty.

Admittedly, the facts in the hypothetical example are extreme. But, attached to this brief as Appendix A is an affidavit from a juror who served in a Texas capital murder trial. The juror noted that, under the instructions given that jury under Article 37.071, he felt that he could not consider whether the defendant could be rehabilitated in determining the answer to Special Issue Number 2.

CONCLUSION

As long as the United States retains capital punishment, there will be tension between between guiding discretion and allowing the jury to mitigate punishment. In effect, the purpose of capital punishment is to determine which defendants are so worthless and dangerous that they should be removed from society eternally.

The Association concedes that it is difficult to balance guided discretion with the unlimited ability to mitigate in such a way to ensure that discretion does not mean that capital punishment is limited to the poor or members of racial minorities while the rich and the white escape the executioner's needle. With each death penalty case decided by our courts, society will gain experience in designing procedures that will guarantee that the

death penalty, if it is to be imposed at all, is imposed only for proper reasons and without regard to impermissible factors.

The Constitution requires that capital sentencing be an individualized determination based on personal responsibility and moral guilt. The current Texas death penalty sentencing system embodied in Article 37.071 simply does not meet this requirement.

Since this Court affirmed Jurek, a majority of the Court of Criminal Appeals has felt that all that is necessary to comply with the Constitution is to allow the defense to place into evidence anything it feels is mitigating without giving juries a method of applying that evidence outside of the narrow structure of Article 37.071 and its special issues. The jury in

a capital murder case simply does not have a vehicle to mitigate punishment. It is impossible under the procedures in Article 37.071 and the special issue system embodied in that statute for a jury to consider in mitigation evidence such as mental disease or defect that would reduce a defendant's moral guilt while making it probable that the defendant will commit crimes of violence in the future.

This Court has made it abundantly clear that there can be no limits on what a jury can consider in mitigation. The Texas capital punishment procedure sets limits on the consideration of mitigation by failing to provide a way to exercise and apply the discretion that a sentencer must have. Texas must develop a system of capital sentencing that properly limits the discretion of the jury to impose the death

sentence without forcing the jury to assess a death penalty on a person who, in the Texas vernacular, "does not need killing" for the reasons articulated by this Court in Booth, McCleskey and Brown.

Article 37.071 fails to meet these constitutional requirements. Hence, it violates the Eighth and Fourteenth Amendments.

Respectfully Submitted,

STANLEY G. SCHNEIDER
11 GREENWAY PLAZA
SUITE 3112
HOUSTON, TEXAS 77046
(713) 961-5901

ATTORNEY FOR
AMICUS CURIAE

CERTIFICATE OF SERVICE

I certify that copies of this Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae was served on all parties pursuant to Rule 28.

STANLEY G. SCHNEIDER

APPENDIX A

A F F I D A V I T

STATE OF TEXAS I

COUNTY OF HARRIS I

BEFORE ME, the undersigned authority, on this day personally appeared Ronald E. Vanderslice, who, after being by me duly sworn, under oath, stated as follows:

My name is Ronald E. Vanderslice. I live in Katy, Texas. I was a juror in the State of Texas v. John D. Matson and the Defendant was assessed the death penalty.

Considerable time has passed since the John Matson trial thus allowing time for reflection on what was a very stressful time for many of us on the jury. This was a particularly difficult time for me as I had to wrestle with two religious beliefs; (1) we are subject to mans laws and should be obedient to same, and (2) revenge should be God's will.

Appendix A

During the guilt phase of the deliberation, I found it necessary to remind the jury of the oath each of us took to make the necessary decision predicated on the evidence presented. I stated to the jury "I would desire nothing more than to take John in my arms and forgive him, since I personally believe in forgiveness." However, as jurors, our decision was limited to a guilty or not guilty verdict.

Several times during the punishment phase I reflected to myself "what if" the judge had allowed the jury to consider the rehabilitation of John Matson in the deliberation. However, since this was not to be considered, one had to remove this thought and follow "the letter of the law."

Appendix A

SIGNED and ENTERED on this 7th day of December, 1987.

/s/Ronald E. Vanderslice

Ronald E. Vanderslice

SUBSCRIBED and SWORN to before me, the undersigned authority, on this 7th day of December, 1987.

/s/ Barbara Puglia

BARBARA PUGLIA, NOTARY PUBLIC
STATE OF TEXAS
My commission expires: 4-23-88

Appendix A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF BILLY CONN GARDNER
AS AMICUS CURIAE FOR PETITIONER**

*EUGENE O. DUFFY
O'Neil, Cannon and Hollman, S.C.
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 276-5000

CHRISTINE M. WISEMAN
Marquette University Law School
1103 W. Wisconsin Avenue
Suite 110
Milwaukee, Wisconsin 53233
(414) 224-7090

Counsel for Amicus Curiae

*Counsel of Record

680PM

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. THE JURY THAT SENTENCED JOHNNY PENRY TO DEATH WAS NOT GIVEN THE AUTHORITY TO REJECT IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF ITS CONSIDERATION OF HIS MENTAL RETARDATION, IN VIOLATION OF THE EIGHTH AMENDMENT RULE OF <u>LOCKETT V. OHIO</u> , 438 U.S. 586 (1978)	18
A. Mr. Penry's Mitigating Evidence -- His Mental Retardation -- Had Relevance Beyond the Scope Of The Special Verdict Questions	21
1. Johnny Penry's History of Mental Retardation And Its Effects On His Behavior	22
2. The Mitigating Value of Mr. Penry's Retardation Was Not Capable Of Being Considered Within The Statutory Framework	38

B. A Reasonable Juror Could Have Believed, Under The Instructions Given, That The Evidence of Mental Retardation Could Not Serve As An Independent Basis For Rejecting Imposition Of The Death Sentence 53

II. THIS COURT SHOULD REACH THE FRANKLIN ISSUE IN THIS CASE AND LEAVE QUESTION TWO FOR ANOTHER DAY 57

CONCLUSION 63

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Burton v. United States</u> , 196 U.S. 283 (1905)	60
<u>California v. Brown</u> , 479 U.S. 538 (1987)	39, 53
<u>Franklin v. Lynaugh</u> , ___ U.S. ___, 101 L.Ed.2d 155 (1988)	passim
<u>Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration</u> , 113 U.S. 33 (1885)	17, 60
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	18, 58, 59, 61
<u>New York City Transit Authority v. Beazer</u> , 440 U.S. 568 (1979)	60
<u>Rescue Army v. Municipal Court</u> , 331 U.S. 549 (1947)	58, 60
<u>Skipper v. South Carolina</u> , 476 U.S. 1 (1986)	39, 53
<u>Spector Motor Co. v. McLaughlin</u> , 323 U.S. 101 (1944)	60
<u>Taylor v. Kentucky</u> , 436 U.S. 478 (1978)	56
<u>Thompson v. Oklahoma</u> , ___ U.S. ___, 101 L.Ed.2d 702 (1988)	59, 60

Other Authorities

- AAMD, Classification in Mental Retardation 1 (H. Grossman, ed., 1983) 24, 35, 36
- Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414 (1985) 35, 46

INTEREST OF THE AMICUS ¹

Amicus curiae, Billy Conn Gardner, is a person sentenced to death in the State of Texas. He has an interest in Mr. Penry's case, because he too was sentenced to death in a proceeding in which his mitigating evidence could not be given mitigating effect. His mitigating evidence was not mental retardation as in Mr. Penry's case. His mitigating evidence was an involuntary and profound addiction to heroin and other drugs since the age of nine (when he was injected by a cousin), the suffering of severe physical and emotional abuse as a child, and strength of character. As with Mr. Penry's mental retardation, however, Mr. Gardner's mitigating evidence "had relevance to

¹ Amicus files this brief by written consent of both parties pursuant to Rule 36.2 of the Rules of the Court. The parties' letters of consent are on file with the Clerk of the Court.

[his] moral culpability beyond the scope of the special verdict questions [given the jury in his case]." Franklin v. Lynaugh, ___ U.S. ___, 101 L.Ed.2d 155, 173 (1988) (O'Connor, J., joined by Blackmun, J., concurring).

Mr. Gardner submits this brief because he believes his analysis of the Franklin issue in Mr. Penry's case can be of help to the Court. Further, because he is directly and personally interested in the Court's clarification of the rights recognized by five members of the Court in Franklin, see pages 18 - 21, infra, he submits this brief to urge the Court to address the Franklin issue, and not avoid it by deciding the broader mental retardation issue presented by Question Two in the petition for writ of certiorari in Mr. Penry's favor. As set forth in point II of his argument, the rights

seemingly established by Franklin need further clarification, Mr. Penry's case is a proper vehicle for such clarification, and the only way to assure that Mr. Penry's case will provide the needed clarification is to decide the Franklin issue.

STATEMENT OF THE CASE

Johnny Paul Penry was convicted and sentenced to death for the rape-murder of Pam Carpenter on October 25, 1979, in Livingston, Texas. At the guilt-innocence phase of the trial, Mr. Penry relied entirely upon an insanity defense, which centered upon his mental retardation. He presented evidence of his history of retardation, its effects on his thinking and behavior, and the history of abusive treatment by his parents which worsened

the effects of retardation. (R. 2129-2321).²

In the sentencing phase of the trial which began immediately thereafter, the State focused solely upon proving that the homicide was "deliberate," that Mr. Penry presented a risk of future dangerousness, and that his homicidal behavior was not provoked by the victim -- the "special verdict questions" to be answered by the sentencer under Texas' capital sentencing scheme. The defense did not respond to these issues, but instead, urged the jury to impose a life sentence because of Mr. Penry's retardation.

The State relied primarily upon expert testimony concerning the characteristics of Mr. Penry's mental

² References to the trial record, consisting of twenty-one volumes numbered sequentially, will be to "R," followed by the appropriate page numbers.

disorder. The State argued that whether the disorder was mental retardation alone, as Mr. Penry's experts believed, or a combination of mental retardation and antisocial personality, as the State's experts believed, its effects were the same: it caused Mr. Penry to act on his impulses, to make no effort to constrain his impulsive behavior, and to act impulsively time and time again despite any punishment for the same impulsive behaviors. For this reason, the State's experts were able to conclude, as one of them had concluded in 1977 in connection with a then-pending rape charge against Mr. Penry: "'that he is dangerous and does constitute a threat to society and will continue to do so, whenever he's free in society.'" (R. 2548). See generally R. 2541-61.

To bolster the experts' opinions, the State introduced evidence of Mr. Penry's history of rape and attempted rape. The only other rape with which he had been charged occurred in 1977. He was convicted and sentenced to a term of two to five years. (R. 2571-72). Following his arrest for the murder of Pam Carpenter, Mr. Penry confessed to two other attempted rapes. (R. 2609-26, 2640-41).

The defense presented only two additional witnesses during the sentencing proceeding. One presented evidence raising a question about Mr. Penry's involvement in one of the attempted rapes to which he had confessed. (R. 2643-50). The other testified that he was a good church member. (R. 2653).

At the close of the sentencing phase evidence, the court instructed the jury to

answer the following questions "yes" or "no" after taking into account "all of the evidence submitted to you in the full trial of the case":

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(R.117-118A).

Prior to the giving of the instructions, Mr. Penry objected on several grounds material to the issues before this Court. He objected to the submission of the case to the jury as a capital punishment case since the imposition of a death sentence upon Mr. Penry would be cruel and unusual in light of his "mental illness and condition." (R. 2662). He objected to the absence of an instruction requiring the sentence to be imposed on the basis of a weighing of aggravating and mitigating circumstances. (R. 2661-62, 2664). And he objected, "because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances." (R. 2662). The court overruled each of these objections.

In the State's initial closing argument thereafter, the entire focus was on the three special issues. The State argued that deliberateness was shown by virtue of Mr. Penry's killing the victim after she was rendered helpless and by virtue of the confessions, in which Mr. Penry said that he intentionally killed the victim. (R. 2667-68). Future dangerousness was shown by Mr. Penry's history of rape and attempted rape and by the expert testimony concerning his mental disorder. (R. 2668). Finally, the State argued that the murder did not occur in response to provocation by the victim but occurred instead, as a result of Mr. Penry's belief that he would be caught and sent to prison if he did not kill her. (R. 2667).

The defense closing arguments focused almost entirely upon Mr. Penry's

retardation. Counsel initially made an effort to tie retardation to the special verdict issues even though he could not suggest how the evidence of retardation might reasonably lead the jury to answer any of the issues "no":

I think also there's been a lot of evidence here about Johnny Paul Penry's mental condition and mental state. Certainly you have to believe that his mental state was not healthy. He's mentally ill. Certainly you know that his environment played a part in this. Think about each of those special issues and see if you don't find that we're inquiring into the mental state of the defendant in each and every one of them.

(R. 2681).

Thereafter, defense counsel made no pretense that the evidence of retardation could logically call for a "no" answer to any of the special issues. Instead, he argued that Mr. Penry's retardation -- independent of the special verdict issues -- called for the jury to impose a life

sentence by answering "no" to any one of the issues:

You know that if you answer any one of these issues no then it is mandatory life.... The records reflect that this boy had an afflicted mind at the age of nine and we can't get around that. The records reflect that later on when he went to school up there for three years[,] he was taken out by his parents who ... [brought] him back into the environment where his mental condition would be worsened by the treatment that he no doubt received. And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer.

(R. 2683-84).

In the course of making this argument, counsel did not contend

seriously that Mr. Penry's retardation rebutted the evidence presented by the State in support of any of the special verdict questions. Indeed, he conceded that Mr. Penry "in all reasonable probability will continue to get into trouble." (R. 2685). His argument instead was that this did not matter, for "a boy with this mentality, with this mental affliction," should not be put to death. (Id.)

In rebuttal, the prosecutor acknowledged that defense counsel's argument was appealing: "[T]his is the type of subject that can be used to easily move you emotionally. It would move anyone, and I think there would be something wrong with you, if you weren't at least concerned." (R. 2690). However, he then dismissed the argument as wholly

irrelevant and improper to the task facing the jury:

But, ladies and gentlemen, your job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence you have heard in this courtroom, then answer those questions accordingly.

(R. 2690). Continuing, the prosecutor explained that the defense argument did not present any proper basis upon which the jury could answer any of the special verdict issues "no."

In answering these questions based on the evidence and following the law, and that's all that I asked you to do, [your job] is to go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason that you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case,

because, ladies and gentlemen, I submit to you we've met our burden.

(R. 2689-90)

Thereafter, the jury returned a verdict answering all of the special verdict issues "yes," (R. 2698-99), and the court imposed a sentence of death in accord with the verdict. (R. 2708-09).

SUMMARY OF ARGUMENT

In proffering evidence of his mental retardation as a mitigating circumstance, Mr. Penry "introduced mitigating evidence" that "had relevance to [his] moral culpability beyond the scope of the special verdict questions...." Franklin v. Lynaugh, ___U.S.___, 101 L.Ed.2d 155, 173 (1988) (O'Connor, J., joined by Blackmun, J., concurring). The defense argued that death was too harsh a punishment for a mentally retarded person like Mr. Penry. However, the prosecution

argued that the special verdict questions could not be answered honestly in the negative because of his retardation. Instead, the evidence of his retardation supported an affirmative answer to each question. Mr. Penry's jury was thus caught in the unconstitutional bind identified by the concurring and dissenting justices in Franklin v. Lynaugh: it was presented with evidence which called for a life sentence but which, at the same time, supported affirmative answers to each of the special verdict questions. In these circumstances, the instructions which permitted the jury only to answer the special questions, "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." 101 L.Ed.2d at 173 (concurring opinion). The Eighth Amendment cannot tolerate the

imposition of a death sentence in these circumstances.

Even though five Justices recognized in Franklin that the Texas death penalty statute could operate unconstitutionally -- in the way we now know it did in Mr. Penry's case -- only three Justices found that it operated unconstitutionally in Mr. Franklin's case. The result has been that the rights recognized in Franklin are still uncertain and insecure. To resolve this uncertainty, the Court needs to decide a Franklin issue in a case in which the unconstitutional application of the Texas statute is manifest. Mr. Penry's case is such a case. However, Mr. Penry's case also presents a broader constitutional question: whether the mentally retarded should ever be eligible for the sentence of death. While the Court should decide this issue and should

decide it in favor of precluding death for the retarded, it should not decide that issue in Mr. Penry's case. If it does, it will have no need to reach the Franklin issue, and the uncertainty surrounding that issue will be left unresolved. For these reasons, and for the additional reason that the Franklin issue is the narrower issue -- and the Court has long sought "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) -- the Court should decide the Franklin issue and leave the broader mental retardation issue to another day.

ARGUMENT

I.

THE JURY THAT SENTENCED JOHNNY PENRY TO DEATH WAS NOT GIVEN THE AUTHORITY TO REJECT IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF ITS CONSIDERATION OF HIS MENTAL RETARDATION, IN VIOLATION OF THE EIGHTH AMENDMENT RULE OF LOCKETT V. OHIO, 438 U.S. 586 (1978)

In Franklin v. Lynaugh, ___ U.S. ___, 101 L.Ed.2d 155 (1988), five Justices of the Court recognized that the Texas capital sentencing scheme can preclude the constitutionally necessary consideration of mitigating circumstances. 101 L.Ed.2d at 172-73 (O'Connor, J., joined by Blackmun, J., concurring); id. at 177-79 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). All five Justices agreed that under the Eighth Amendment capital sentencers must be permitted not only to consider any relevant mitigating evidence but also to

give effect to that evidence by deciding not to impose a death sentence.³ In the view of these Justices, the Texas capital sentencing process can in certain cases prevent the jury from giving effect to its consideration of mitigating evidence. As Justice O'Connor explained,

Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberateness of the murder and the defendant's future dangerousness. To the extent that the mitigating evidence

³ Id. at 172-73 (concurring opinion) ("it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty[;] ... [t]he right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration"); id. at 177 (dissenting opinion) ("[a] sentencing jury must be given authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or circumstances of the offense proffered by the defendant in support of a sentence less than death").

introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

101 L.Ed.2d at 173. Accord, 101 L.Ed.2d at 177-78 (dissenting opinion).

Johnny Penry's case is the kind of case in which the Texas sentencing scheme did preclude the jury from giving effect to its consideration of mitigating evidence. In introducing evidence of his mental retardation, Mr. Penry "introduced

mitigating evidence" that "had relevance to [his] moral culpability beyond the scope of the special verdict questions." Because this evidence nevertheless supported affirmative answers to the special verdict questions, and because the sentencing phase instructions did not authorize the jury to give effect to the mitigating aspects of this evidence, there was a very substantial risk that the jurors did not believe they could give mitigating effect to their consideration of Mr. Penry's evidence of mental retardation. In these circumstances, Mr. Penry's sentencing proceeding violated the Eighth Amendment.

A. Mr. Penry's Mitigating Evidence -- His Mental Retardation -- Had Relevance Beyond the Scope Of The Special Verdict Questions

The evidence of Johnny Penry's mental retardation was the primary evidence proffered in mitigation at his trial. His

counsel did not seriously argue that it provided a logical basis for answering any of the special verdict questions "no," yet they argued vigorously that it was a compelling reason not to impose the death sentence. If, notwithstanding counsel's argument, this evidence could have provided a logical basis for answering one or more of the special verdict questions "no," "the jury was free to give effect to that evidence." Franklin, 101 L.Ed.2d at 173 (concurring opinion). Accordingly, the evidence of mental retardation must be carefully analyzed to determine its relationship to the special verdict questions.

1. Johnny Penry's History of Mental Retardation And Its Effects On His Behavior

Johnny Paul Penry was twenty-three years old at the time that he killed Pam Carpenter. (R. 2137). However, he

functioned in a far more limited way than most twenty-three-year olds. Intellectually, he reasoned and made decisions more like a six- or seven-year-old-child. (R. 568). Behaviorally, he took care of himself and related to others more like a nine- to ten-year-old child. (R. 568-69).

Johnny Penry functioned like this because he is mentally retarded, and has been for his entire life. He has consistently scored in the range of 50 to 63 on standardized intellectual (IQ) tests and has demonstrated a comparable deficiency in "adaptive behavior." (R. 568-69, 2140-53, 2377, 2379). As an expert for the State explained, mental retardation involves deficiencies in both intellectual functioning and adaptive behavior, or "day-to-day" functioning, i.e., "what goes on with himself and with

... the social environment." (R. 2334).⁴ Mr. Penry has demonstrated marked deficiencies in intellectual functioning and adaptive behavior throughout his life.

From the time he was old enough to start school, Johnny could not function like most other children his age. As his mother explained, "I couldn't keep him in a public school. He didn't have the learning capacity that the other children had, and the teachers said they just couldn't cope with him. They couldn't teach him like the other children." (R.

⁴ The leading professional organization in the field of mental retardation, the American Association on Mental Retardation (formerly the American Association on Mental Deficiency), defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." AAMD, Classification in Mental Retardation 1 (H. Grossman, ed., 1983). "[A]daptive behavior refers to what people do to take care of themselves and to relate to others in daily living rather than the abstract potential implied by intelligence." Id. at 42 (emphasis supplied).

2239). As a result, his parents placed him in a private school with a special class for mentally retarded children. (R. 2239-40). Johnny made no academic progress in three years at that school (R. 2239-43), so his parents turned to a diagnostic center at the University of Texas for help.

By this time, Johnny was presenting serious problems at home as well. He began "prowling" around the neighborhood at night (R. 2244), so his parents covered the windows in his bedroom with plywood and locked him into the room at night (with a lock on the outside of his door). Id. Sometimes he was locked in the bedroom during daytime hours as well. (R. 2277). During the time he was locked in his bedroom -- at night or in the daytime -- he was generally left unattended.

(R. 2277). Without access to a bathroom, he would go the bathroom in his clothes, then stuff his soiled clothes into holes that he made in his bedroom walls. (R. 2247).

His interactions with his siblings were often inappropriate. For example, his mother once found him "picking all the skin from his [baby brother's] feet with a straight pin" (R. 2245); he "smeared ... dog stuff [feces]" over his siblings' cookies on another occasion (R. 2246); and "he would pick scabs off the other kids and off of himself and eat them" (R. 2246-47).

Thus, when Johnny's parents took him to the University of Texas Medical Branch at Galveston in July, 1965, when he was nine years old, staff of the Medical Branch noted that Johnny often behaved in an inappropriate and bizarre manner and

had great difficulty in social interactions:

Mrs. Penry has to keep John in a locked, bare room at night in order to keep him in, and he requires constant supervision during the day. He shows destructive tendencies in that he has always torn up his toys, including a tricycle and a metal wagon. Mrs. Penry stated that John is changeable in his moods, often loving and kind to his siblings, but more than likely is aggressive toward them, especially toward the three-year old boy whom he hits and bites. Mrs. Penry does not leave John alone with their three-year old for fear that John will harm him. John's behavior has included setting fire to a friend's bathroom while he was in her care; climbing the flagpole at school; jabbing girls in the classroom with a newly sharpened pencil; and staying out in the rain and resisting the teacher's attempts to get him in. He also wanders out of the classroom and plays with the water in the toilet.

DX 8, at 3.⁵

⁵ Defendant's trial exhibits will hereafter be referred to as "DX," followed by the exhibit number. The first reference to a particular exhibit will also note the page number

Psychological testing "reveal[ed] fairly severe retardation with a total IQ of just over 50," and "[i]t also revealed marked evidence of classic organic brain damage." DX 8, at 6.

Doctors at the Medical Branch recommended that Johnny be placed in a state school for the mentally retarded. DX 8, at 6-8. In keeping with this recommendation, Johnny was a resident in the Austin State School for a few months. DX 4 (admitted, R. 2125). His parents resisted his institutionalization however, so he did not stay there any longer. (R. 2241).

In 1968, when Johnny was twelve, his parents again placed him in a state school for a period of several months, this time the Mexia State School. See DX 3

in the trial record where the exhibit was admitted into evidence

(admitted, R. 2125). In the intake interview at the school, a caseworker noted that his parents were not forthcoming about their treatment of Johnny, and that their behavior during the interview raised troublesome questions about their relationship with him:

Throughout the interview both parents seemed reluctant to discuss their true problems and evaded direct questions concerning their relationship with subject. The father was greatly concerned about subject's religious training as a Jehovah's Witness and had difficulty in controlling his emotions (his lips quivered and eyes filled with tears) as he quoted scripture and explained his beliefs. The mother, though never removing her dark sun shades, wept frequently throughout the interview and had very little to say. Both parents were rigid when parting with subject, and showed no affection. The mother did not say anything to the subject, but hurriedly went to the car, crying and sobbing aloud for a few seconds. I got the impression that she felt this was expected of her.

DX 3, at 5. Staff at Mexia State School later confirmed this caseworker's suspicions, for "[a] few days after admission, when [Johnny's] hair was cut, it was discovered he had many small scars over his head." Id. When Johnny was asked how he had gotten these scars, "he said they were from cuts made by a large belt buckle which his mother used when whipping him." Id.

This history was confirmed at trial by Johnny's sister Trudy. (R. 2279). The parental abuse that it signified, however, was far worse than the "many small scars over [Johnny's] head" might suggest. As subsequent medical records revealed, Johnny was tortured, not nurtured, by his parents:

Past history obtained from his two sisters ... reveals that Johnny was termed by his mother as 'brain damaged' since birth; however, there was a serious history of child abuse from very

early on. The sisters state that the mother threw Johnny about the room whenever he cried as early as 9 months old and at least on one [o]ccasion broke one of his arms. Since Johnny was brain damaged the mother locked him in a dark room where he remained for many years. There was evidence of having been beaten severely and scars were left on his back and both legs. He was forced to kneel on sharp objects as punishment; his mother burned him with cigarettes for punishment. On one occasion ... she threatened to castrate him for continued bed-wetting and obtained a knife to do this with.

DX 7 (admitted, R. 2125), at 4.⁶ Not surprisingly, for as long as his sister could remember, Johnny "always would act afraid [,] ... [a]fraid of the dark ... [and] afraid of people." (R. 2279-80). And as a medical report observed in 1973, "[Johnny] has slept with a knife under his

⁶ This history was recorded by staff at the Austin State Hospital in September, 1973, where Johnny was evaluated in connection with a charge of arson. He was seventeen years old at that time.

pillow because he was terrified that his mother would come and get him...." DX 6 (admitted, R. 2125), at 2.⁷

The effects of parental abuse were particularly devastating for Johnny. During the time he resided at Mexia State School (when he was twelve), his IQ was measured at 51. Nevertheless, there was still hope for the future. As noted in a Mexia psychological evaluation after his admission, "In view of his intellectual level, it is likely that he will profit from academic training. In addition, it is likely that he could become self-sustaining in the future with proper supervision and training." DX 3, at 2. This hope for Johnny's future was dashed when, after several months at Mexia, he

⁷ DX 6 is the medical record from Rusk State Hospital, the institution to which Johnny was committed for three months after the evaluation in September, 1973 at Austin State Hospital.

was removed by his father. As a later medical record reported, "[Johnny's] father brought him home for a visit and upon learning that Johnny was homosexual thought that the Mexia State School was responsible for this and would not return him." DX 7, at 4.

Johnny's removal from Mexia State School at the age of twelve put an end to this early forecast that he might "profit from academic training" or "become self-sustaining ... with proper supervision and training." DX 3, at 2. He returned to the abusive household from which he had come, where he was "always afraid." In addition to the longstanding abusive dynamics of the household, upon his return Johnny was exposed to yet another kind of abuse. As a result of his exposure to homosexual abuse in Mexia State School, he became vulnerable to repeated sexual

abuse. For the next several years, this became another form of mistreatment in Johnny's already abusive daily life. Thus, by September, 1973, when Johnny was seventeen, his medical record noted that "[h]e has had a long history of being sexually exploited by older and more intelligent homosexuals." DX 5, at 7.

This life-long history of multiple forms of abuse made it impossible for this young man, already handicapped by mental retardation, to adjust appropriately to his environment. Throughout his adolescent years, Johnny had to be continually supervised by adults, see R. 2297 (testimony of Jasper Jones); R. 2307-2312 (testimony of Patsy Ross), and to the extent that he socialized at all, he played with much younger children, who ranged from six to nine years old. (R. 2265-66). Thus, by the time Johnny was

seventeen, a psychological evaluation observed, "In light of his social history, retardation has apparently been greatly magnified by a grossly impoverished developmental and environmental background." DX 6, at 6.

Nearly four years later, on July 25, 1977, Johnny was convicted of rape. (R. 2571). The same psychiatrist who would later testify for the state in the instant case, Dr. Felix Peebles, evaluated him in connection with this charge and found that "he is moderately retarded and his judgment and insight are moderately to severely impaired." State's Exhibit 59 (admitted, R. 2160), at 3.⁸ Dr. Peebles

⁸ Degrees of mental retardation are classified by the American Association on Mental Retardation in four categories: mild, moderate, severe and profound. Classification in Mental Retardation, supra, at 13. The largest number of mentally retarded people, about 89 percent, are classified in the "mild" category. See Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 423 (1985).

explained that "[a] person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately.... He has also not learned from his mistakes and is likely to continue making some of his same mistakes over again." Id. at 3-4.

Despite the optimistic connotation of the term "moderate," a person who suffers this degree of retardation in fact has a severe mental deficiency found in less than 10-15 percent of the mentally retarded population. The intellectual capacity of a "moderately" retarded adult reaches a peak at a level comparable to an average eight-year-old child. Classification in Mental Retardation, supra, at 32-33. The only levels of retardation more severe than that assessed for Mr. Penry are "severe," in which maximum intellectual capacity is comparable to a three- to five-year-old child, and "profound," in which the mentally retarded individual is found to be infantile, often existing in a catatonic or other non-interactive state. Id. The degree of disability for severely or profoundly retarded persons is so great that these persons are not likely to be involved in murders. They generally reside in institutions and are not capable of the mentation or the behavior necessary for such acts.

These features of Johnny's retardation affected him throughout his life. At the trial, they were strikingly illustrated by two examples provided by Johnny's aunt, Patsy Ross, who lived in Johnny's father's home and who helped care for Johnny after his father removed him from Mexia State School.

Ms. Ross explained that she worked with Johnny for nearly a year when he was fourteen or fifteen trying to teach him to write his name. Working "[e]very day[,] [a] little time every day[,] [r]epetitiously" (R. 2309), for a year, Ms. Ross was able to teach Johnny to print his name. But even then, "he couldn't spell it correctly," and "he could print it, but he couldn't write it." (R. 2308).

Ms. Ross also explained how she tried to enlist Johnny's help in hoeing the weeds in her garden. "I wanted him to hoe

the weeds, but lots of times he'd hoe the flowers and leave the weeds. He couldn't recognize it for a long time unless I just pointed it out absolutely and stood right over him and [said] 'that's what you don't chop down.'" (R. 2311). No matter how hard Ms. Ross tried to teach Johnny, he still made the same mistake. "If I turned my back on him, he was going to do what he wanted to do. If he was going to chop, he was going to chop what he wanted to chop. There was no way out of that. Lost a lot of flowers that way." (R. 2312).

2. The Mitigating Value of Mr. Penry's Retardation Was Not Capable Of Being Considered Within The Statutory Framework

Mr. Penry's conduct at the time of the crime was significantly influenced by his retardation. Accordingly, his retardation could have led reasonable jurors to believe that he should not be

sentenced to death. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse...." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). See also Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) ("[s]ociety's legitimate desire for retribution is less strong with respect to ... defendants who have reduced capacity for considered choice[;] ... [e]vidence concerning the defendant's ... emotional history thus bear[s] directly on the fundamental justice of imposing capital punishment"). This belief certainly could have been held by some of

Mr. Penry's jurors and could have led them to believe that death was too harsh a sentence. The entire thrust of defense counsel's arguments was directed to this belief. However, as the prosecutors' arguments so clearly pointed out, the special verdict questions that the jury had to answer in order to determine Mr. Penry's sentence could not be answered honestly in the negative because of his retardation. Instead, the evidence of his retardation supported an affirmative answer to each question.

Mr. Penry's jury was thus caught in the unconstitutional bind identified by the concurring and dissenting justices in Franklin v. Lynaugh: it was presented with evidence which called for a life sentence but which, at the same time, supported affirmative answers to each of the special verdict questions. In these

circumstances, the instructions which permitted the jury only to answer the special questions, "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." 101 L.Ed.2d at 173 (concurring opinion). To appreciate the bind in which Mr. Penry's jury thus found itself, one must examine first the relationship between Mr. Penry's retardation and the offense and then the relationship between his retardation and the special verdict questions.

The disabilities persistently suffered by Mr. Penry because of his retardation -- his profound social isolation, his mis-comprehension of the external world, his acting on impulses without the intervention of appropriate social judgment, his inability to learn from past experience, his inability to modify his behavior on the basis of his

present experience, his severely limited repertoire of adaptive behaviors, and his limited moral judgment -- all played a role in the murder of Pam Carpenter.

Johnny first took note of Ms. Carpenter when he helped an acquaintance deliver some appliances to her house in early October, 1979. He later told police he immediately felt attracted to her. Upon seeing her, he "remember[ed] that [he] had seen [her] downtown before and liked her looks." (R. 2023). Johnny did not act on these feelings this time. Three weeks later, however, he saw another woman who reminded him of Pam Carpenter, and he suddenly decided that he would go to Ms. Carpenter's house to try to have sex with her. (R. 2023).

This simple course of events itself reveals the multiple effects of Johnny's disability. Taking socially appropriate

action in response to powerful human desires is a very complex task, a task for which Johnny was ill-suited by his retardation and his life experiences. Johnny's most meaningful, and primary, social interactions were with six- to nine-year-old children. In his social interactions with adults, Johnny was persistently abused, tortured, and forcibly isolated. Thus, he had no role models from whom to learn -- even at his very slow rate -- the elements of socially appropriate adult relationship. Because of his limited intellectual ability, it was very difficult for him to empathize, to perceive another's feelings and to treat that person with respect for her feelings. And because of his severely restricted repertoire of adaptive behaviors, he was unable to see alternatives for action in relation to his

strong feelings about Ms. Carpenter. When Johnny went to Ms. Carpenter's house and pushed his way through the door in order to have sex with her, he thus lacked the basic behavioral and intellectual tools taken for granted by most members of society. What happened thereafter was as much a product of these significant deficits as his initial decision to go there.

When Johnny pushed his way into Ms. Carpenter's house and began to assault her, she resisted. She fought him and stabbed him with a pair of her scissors, but he was not deterred. He was driven by his desire for her, and was unable to vary from his plan. Like the many times Johnny hoed flowers instead of weeds in his aunt's garden, "he was going to do what he wanted to do.... There was no way out of that." (R. 2312). His abilities to

empathize and to modify his behavior on the basis of its impact on another person were simply too limited. For these reasons, Johnny continued his assault upon Ms. Carpenter until he had the sexual liaison that he desired.

The assault upon Ms. Carpenter did not stop at this point, however. Johnny picked up the scissors with which Ms. Carpenter had previously stabbed him, and stabbed her in the chest. As he recounted in one of his confessions, "I told her that I was going to kill her and that I hated to but I thought she would squeal on me." (R. 2028).⁹ Whether these words or

⁹ Mr. Penry's purported confessions were seriously questioned by the defense psychiatrist, Dr. Jose Garcia. Upon reviewing the written confessions, which were admittedly written by the police, and supposedly read back to Mr. Penry and approved by him, Dr. Garcia questioned their integrity:

The concept of time, the language, there is no way that a person with the demonstrated intellectual capacity [of Mr. Penry] is capable

concepts were truly those of Johnny Penry or of the police, his behavior in stabbing Ms. Carpenter was the product of mental retardation.

At some level, Johnny was aware that his assault upon Ms. Carpenter was something that others might be angry about. Whenever he had done things in the past that made his parents angry, he was treated very harshly: he was locked in a dark room for hours, he was beaten severely, he was forced to kneel on sharp objects, and he was burned with

of using that type of syntax, that type of language, that type of sentence organization. There is no way that this can be language obtained from the person unless somebody read it and purportedly he agreed that that's what he said and signed it.

(R. 2205). Dr. Garcia's suspicions were well-founded for "[m]any persons with mental retardation ... have a particular susceptibility to perceived authority figures and will seek the approval of these individuals even when it requires giving an incorrect answer." Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. at 431-32.

cigarettes. Thus, Johnny knew that when he did things that made people angry, they hurt him. He was profoundly afraid of what could happen when he made people like his parents angry. Faced with this fear again after assaulting Ms. Carpenter, Johnny reacted -- out of a desire to protect himself from being hurt -- by killing her. A nonretarded person in Johnny's situation probably would have been motivated as well to avoid what he knew could be the consequences for assaulting Ms. Carpenter. But to that person, a much broader array of avoidance behaviors would have been apparent. To Johnny, however, whose repertoire of adaptive behaviors was very small, whose ability to empathize was extremely limited, and whose fear of being tortured and hurt was overwhelming, the only

alternative he could perceive was to kill the person who would tell on him.

Even though some of Mr. Penry's jurors might have been persuaded that the relationship between his retardation and his offense called for a life sentence, when they examined the relationship between his retardation and the special verdict questions, they would have found no way in which to give effect to their belief that he should be sentenced to life. When the evidence of Mr. Penry's retardation was squeezed into the framework established by the special verdict questions, the mitigating character of the evidence was culled away. The aggravating qualities of the evidence could be considered, but the mitigating qualities could not be.

The first special verdict question asked whether the murder was committed

"deliberately and with the reasonable expectation that the death of the deceased ... would result." Mr. Penry purportedly confessed that he intended to kill Ms. Carpenter, and he expected that she would die when he stabbed her. As we have shown, his mental retardation plainly contributed to the formation of the mental state of "deliberateness." The fear that he would be hurt for raping Ms. Carpenter, the inability to empathize with her and to recognize and respect her right to live, and the inability to choose other adaptive behaviors, were all a product of his retardation, and these factors led him to commit a deliberate killing. In part because of the contribution of Mr. Penry's retardation to his mental state, therefore, the jury had little choice but to answer the first special verdict question "yes."

The second special verdict question asked whether there was "a probability" that Mr. Penry "would commit criminal acts of violence that would constitute a continuing threat to society." The evidence showed that Mr. Penry had been convicted of rape once before and that he had raped or attempted to rape several other women before he raped and killed Ms. Carpenter. More importantly, the evidence concerning his mental retardation and his life-long history of abuse by others showed that he was more likely to commit such crimes again than someone who was not so disabled. His retardation made it terribly difficult for him not to act upon the powerful emotional drives that everyone feels, and prevented him from engaging in socially appropriate behaviors in response to those drives. In addition, it made it almost impossible for him to

learn from his past transgressions. Without the proper supportive environment -- which he never had -- Mr. Penry was virtually doomed to repeat his past mistakes. Thus, his retardation supported, rather than negated, a finding of future dangerousness. In major part because his mental retardation and life history made him susceptible to committing future acts like this one, the jury had little choice but to answer the second special verdict question "yes."

As with the first and second special verdict questions, Mr. Penry's mental retardation also supported, rather than negated, a "yes" answer to the third special verdict question. This question asked whether "the conduct of the defendant ... in killing ... the deceased [was] unreasonable in response to the provocation, if any, by the deceased."

Mr. Penry's homicidal conduct plainly was unreasonable in response to any provocation. He did not kill Ms. Carpenter in the course of the fight he had with her, during which she stabbed him. (R. 2025-26). Rather, he killed her after raping her and after any struggle had ended. By his account, he killed her solely because he was afraid she would tell on him. As we have noted, Mr. Penry's retardation contributed substantially to his motivation for killing Ms. Carpenter. That his motivation for killing her was a product of retardation, however, in no way diminished the unreasonableness of the killing "in response to any provocation ... by the deceased." Accordingly, as with the other special verdict questions, the jury had little choice but to answer the third question "yes."

B. A Reasonable Juror Could Have Believed, Under The Instructions Given, That The Evidence of Mental Retardation Could Not Serve As An Independent Basis For Rejecting Imposition Of The Death Sentence

As we have demonstrated, reasonable jurors could have found that Mr. Penry's evidence of mental retardation could not be considered as mitigating under any of the special verdict questions. If those jurors nevertheless believed that the evidence of mental retardation warranted rejection of the death penalty -- as they reasonably could have, see California v. Brown; Skipper v. South Carolina -- what could such a juror do?

The defense urged such jurors to answer any of the special verdict questions "no," even though an honest and straightforward answer to each of the questions would have been "yes." Thus, Mr. Penry's counsel argued that the jury

should do what in Franklin v. Lynaugh, defense counsel requested that the court instruct the jury to do:

The instructions [Franklin] sought would only have informed the jury that it could answer either or both of the Special Issues "no" if it found that the mitigating evidence justified a sentence less than death--whether or not that evidence was relevant to deliberateness or future dangerousness-- authority the jury assuredly had under the Constitution and under the Texas sentencing scheme as we have previously construed it.

101 L.Ed.2d at 178 (dissenting opinion). Without such an instruction, the Franklin dissenters found that it was only "remotely possible that the jury that sentenced petitioner intuitively understood that possibility...." Id.

In Mr. Penry's case, with defense counsel urging the jury to exercise this option, the possibility that a juror would have done so would seem somewhat greater than in Franklin. However, three

additional factors made the possibility just as remote. In response to the defense argument, the prosecutor explained to the jury that its duty was to follow the law, and the law required that the jurors answer only the three special verdict questions on the basis of the evidence. The law permitted the jury to do nothing else.

[Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly.

(R. 2690).

Second, the prosecutor reminded the jurors that "[y]ou've all taken an oath to follow the law and you know what the law is." (R. 2689). Having been reminded of this oath and of the duty to answer the special verdict questions solely as the evidence required, any juror who might

have initially entertained giving a "no" answer of the sort urged by the defense could reasonably have believed that he or she was prohibited by law and a solemn oath from giving such an answer.

Finally, defense counsel's "arguments ... cannot substitute for instructions by the court," Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978), and the instructions actually given foreclosed any possibility that the jury might engage in the kind of nullification urged by the defense. The instructions directed the jury solely to determine each of the special verdict questions. None of the instructions sought by the defense -- to allow the jury to weigh aggravating and mitigating circumstances or to permit "a discretionary grant of mercy based upon the existence of mitigating circumstances" (R. 2662) -- was given by the trial judge.

In the absence of instructions like these, and in light of the prosecutor's argument and the jurors' oaths, a reasonable juror could have believed that he or she had no vehicle through which to express the view that Mr. Penry should not be sentenced to death.

Because a reasonable juror in Mr. Penry's case could have believed that the evidence of his mental retardation warranted a sentence less than death, yet could also have believed that the instructions precluded the imposition of a life sentence on this basis, the Eighth Amendment cannot tolerate Mr. Penry's death sentence.

II.

THIS COURT SHOULD REACH THE
FRANKLIN ISSUE IN THIS CASE AND
LEAVE QUESTION TWO FOR ANOTHER
DAY

At this point in Texas, Franklin v. Lynaugh has left capital defendants'

rights "uncertain and insecure." Rescue Army v. Municipal Court, 331 U.S. 549, 572 (1947). Five Justices in Franklin recognized that the application of the Texas death penalty statute could in certain cases violate the Eighth Amendment rule of Lockett v. Ohio, 438 U.S. 586 (1978). Only three Justices, however, concluded that the statute had this effect in Franklin's case. Franklin has thus left the rights recognized by a majority of the Court in an "uncertain and insecure" state. To settle this matter, the Court needs to decide the Franklin issue anew in a case in which the facts demonstrate the constitutional violation. Mr. Penry's case is such a case. If the Court decides the broader issue presented by Mr. Penry's case -- whether the mentally retarded can be subject to the death penalty -- it will likely find that

it need not address the Franklin issue. The Court could very well rule that the mentally retarded cannot be eligible for the death penalty, and on this basis, conclude that Mr. Penry's Franklin issue is moot. See, e.g., Thompson v. Oklahoma, ___ U.S. ___, 101 L.Ed.2d 702, 735 (1988) (deciding that the Eighth Amendment prohibited the death penalty for 15-year-olds in states like Oklahoma, making it unnecessary to decide the narrower Lockett issue that was also presented). In the event the Court reaches this conclusion-- as it should if it addresses the retardation issue -- the rights recognized in Franklin will remain uncertain and insecure. Accordingly, to assure that the Franklin rights are not left in this posture, the Court should address only the Franklin issue presented by Mr. Penry.

The settled doctrine that the court "ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable," New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979) (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944)), also counsels against reaching the broad prohibition issue. The Court has long sought to "avoid unnecessary, or unnecessarily broad, constitutional adjudication," Thompson v. Oklahoma, 101 L.Ed.2d at 735 (O'Connor, J., concurring), by choosing "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). Accord New York City Transit Authority v. Beazer; Rescue Army v. Municipal Court,

331 U.S. at 569; Burton v. United States, 196 U.S. 283, 295 (1905). The facts of Mr. Penry's case require decision only of the Lockett-Franklin issue and not the broader issue of the prohibition the death penalty for the mentally retarded.

A decision to address only the Franklin issue would not prejudice Mr. Penry or the State. Mr. Penry was sentenced to death in a proceeding in which his mental retardation could not be considered as a mitigating circumstance. If the jury had been able to consider and give mitigating effect to its consideration of his retardation, there is a strong likelihood that he would not have been sentenced to death. By addressing the Franklin issue and leaving the broader issue undecided, the Court can allow a state resentencing proceeding to reach the same result that would be reached for Mr.

Penry if the Court decided that no mentally retarded person should be executed. In the unexpected event that Mr. Penry were resentenced to death in such a proceeding, the Court could then take up the broader mental retardation issue. Thus, from Mr. Penry's perspective, it is unnecessary to decide the broader issue at this time.

Further, it is not necessary to decide the broader issue from the State's perspective. No court in Texas or in the Fifth Circuit has held that the Eighth Amendment precludes the death penalty for the mentally retarded. Accordingly, there is no barrier to implementation of its capital punishment statute which the State presently needs the Court to address.

Accordingly, there is no need to decide, and there are strong reasons not to decide, in Mr. Penry's case, the

broader constitutional issue presented by Question Two. The Court should reach the issue presented by Question One, and reverse the Fifth Circuit on the Franklin issue.

CONCLUSION

For all the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

*EUGENE O. DUFFY
O'Neil, Cannon and Hollman, S.C.
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 276-5000

CHRISTINE M. WISEMAN
Marquette University Law School
1103 W. Wisconsin Avenue,
Suite 110
Milwaukee, Wisconsin 53233
(414) 224-7090

Counsel for Amicus Curiae

*Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

Petitioner

- vs. -

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

**BRIEF OF *AMICUS CURIAE* TEXAS CRIMINAL DEFENSE
LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER**

MARK STEVENS*
442 DWYER
SAN ANTONIO, TEXAS 78204
(512) 226-1433

DAVID BOTSFORD
800 SOUTHWEST TOWER
SEVENTH AT BRAZOS
AUSTIN, TEXAS 78701
(512) 476-9121

CAROLYN GARCIA
2038 LEXINGTON STREET
HOUSTON, TEXAS 77098
(713) 524-5007

ATTORNEYS FOR THE TEXAS CRIMINAL DEFENSE
LAWYERS ASSOCIATION

*COUNSEL OF RECORD

25/96

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
 ARGUMENT	
THE JURY INSTRUCTIONS GIVEN LIMITED THE ABILITY OF THE JURY TO FULLY CONSIDER AND GIVE EFFECT TO THE RELEVANT MITIGATING EVIDENCE OF MR. PENRY'S MENTAL IMPAIRMENT AND TROUBLED CHILDHOOD, IN VIOLATION OF THE EIGHTH AMENDMENT.....	2
A. The Evidence Was Applied By The Jury Only To Reach Affirmative Answers To The Special Issues.....	3
B. In Addition To The Evidence Which Supported Affirmative Answers To The Special Issues, There Was Substantial Mitigating Evidence.....	3
C. Although The Jury Had Relevant Mitigating Circumstances Before It, There Was No Way For The Jury To Consider And Act Upon This Evidence To Impose A Life Sentence.....	6
D. The Jury Was Told From The Beginning That Its Punishment Considerations Were Limited To The Three Special Issue Questions.....	8

E. Because Of The Nature Of Mr. Penry's Mitigating Evidence, There Is No Basis For Speculating That The Jury Considered It In Answering The Special Issues.....	10
F. <i>Lockett</i> And Its Progeny Demonstrate The Constitutional Error In Mr. Penry's Case.....	12
G. The Fifth Circuit Recognized The Constitutional Problem In This Case.....	14
H. <i>Jurek v. Texas</i> Need Not Be Overruled.....	16
I. <i>Franklin v. Lynaugh</i> Is Limited To Its Facts.....	17
J. What Was The Jury To Do.....	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Anderson v. State</i> , 701 S.W.2d 868 (Tex. Crim. App. 1985).....	15
<i>Burger v. Kemp</i> , 107 S.Ct. 3114 (1987).....	5
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	10
<i>California v. Brown</i> , 107 S.Ct. 837 (1987).....	4
<i>California v. Ramos</i> , 463 U.S. 992 (1983).....	5
<i>Clark v. State</i> , 717 S.W.2d 910 (Tex. Crim. App. 1986) <i>cert. denied</i> , 107 S.Ct. 2202 (1987).....	15
<i>Cordova v. State</i> , 733 S.W.2d 175 (Tex. Crim. App. 1987).....	15
<i>Demouchette v. State</i> , 731 S.W.2d 75 (Tex. Crim. App. 1986).....	15
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	5
<i>Franklin v. Lynaugh</i> , 108 S. Ct. 2320 (1988).....	17
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980).....	17
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	16
<i>Hitchcock v. Dugger</i> , 107 S. Ct. 1821 (1987).....	5
<i>Johnson v. State</i> , 691 S.W.2d 619 (Tex. Crim. App. 1984).....	15
<i>Jurek v. State</i> , 522 S.W.2d 934 (Tex. Crim. App. 1975), <i>aff'd</i> , <i>Jurek v. Texas</i> , 428 U.S. 262 (1976).....	16
<i>Locke v. Ohio</i> , 438 U.S. 586 (1978).....	4
<i>Mills v. Maryland</i> , 108 S.Ct. 1860 (1980).....	7
<i>Penry v. State</i> , 691 S.W.2d 636 (Tex. Crim. App. 1985), <i>cert. denied</i> , 106 S.Ct. 834 (1986).....	3
<i>Penry v. Lynaugh</i> , 832 F.2d 915 (5th Cir. 1987).....	14
<i>Proffitt v. Florida</i> , 428 U.S. 242 (1976).....	16
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979).....	11
<i>Skipper v. South Carolina</i> , 106 S.Ct. 1669 (1986).....	3

<i>Stewart v. State</i> , 686 S.W.2d 118 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 190 (1985).....	15
<i>Sumner v. Shuman</i> , 107 S.Ct. 2716 (1987).....	13
<i>Williams v. State</i> , 622 S.W.2d 116 (Tex. Crim. App. 1981), cert. denied, 455 U.S. 1008 (1982).....	15
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	6
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983).....	10
 <i>Constitution</i>	
U.S. Const., Amend. VIII.....	6
U.S. Const., Amend. XIV.....	6
 <i>Statutes:</i>	
Tex. Crim. Proc. Ann. art. 37.071.....	3
Tex. Crim. Proc. Ann. art. 37.071 (b).....	3
Tex. Crim. Proc. Ann. art. 37.071 (e) (Vernon Supp. 1988).....	3

No. 87-6177

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

Petitioner

- vs. -

JAMES A. LYNAUGH, DIRECTOR,
 TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

**BRIEF OF AMICUS CURIAE TEXAS CRIMINAL DEFENSE
 LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association is a non-profit membership organization made up of over 1,200 licensed attorneys throughout the State of Texas who are concerned about the criminal justice system and the citizens who come before the courts of our state.

There are presently over 270 men and women on death row in Texas, and this number is steadily increasing. Many of these persons are represented by members of the Texas Criminal Defense Lawyers Association. Although the question presented in this case concerns the constitutionality of article 37.071(b) as it applies to

Johnny Paul Penry, resolution of the issue will potentially affect many of the persons presently on death row in Texas.

This brief is filed in support of petitioner, Johnny Paul Penry. It addresses only the first question presented in Mr. Penry's Petition for Writ of Certiorari. Because of the Association's experience and familiarity with litigation involving article 37.071, we believe that we can be of assistance to the Court in this case. Consent has been granted by both parties to the filing of this *amicus curiae* brief, and is on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Eighth Amendment mandates that a capital sentencing jury be permitted to fully consider and act upon relevant mitigating evidence. Mr. Penry presented two types of evidence which have been previously recognized by this Court as relevant and mitigating. First, he suffered from a lifelong, incurable, organic brain disorder that rendered him mentally retarded and unable to control his impulsive behavior. Second, he had a miserable childhood, received no formal education, spent time in several mental institutions and suffered mental and physical abuse at the hands of his parents.

Despite Mr. Penry's efforts to have the jury instructed that it could consider and give effect to both types of mitigating evidence, the jury was instructed that its sentencing deliberations were limited to the determination of the three statutory special issues.

Accordingly, the jury was precluded from fully considering or giving effect to both types of mitigating evidence. As such, the jury was precluded from expressing a "reasoned moral response" to that evidence in violation of the Eighth Amendment.

ARGUMENT

THE JURY INSTRUCTIONS GIVEN LIMITED THE ABILITY OF THE JURY TO FULLY CONSIDER AND GIVE EFFECT TO THE RELEVANT MITIGATING EVIDENCE OF MR. PENRY'S MENTAL IMPAIRMENT AND TROUBLED CHILDHOOD, IN VIOLATION OF THE EIGHTH AMENDMENT.

A. The Evidence Was Applied By The Jury Only To Reach Affirmative Answers To The Special Issues

The jury convicted Johnny Paul Penry of killing and raping Pamela Carpenter. [R.I—111] The punishment phase of the trial was then had, at which time both the state and the defense offered additional evidence.

At the conclusion of the punishment phase, the jury was instructed to answer the three special issue questions enumerated in article 37.071(b) of the Texas Code of Criminal Procedure to determine whether Mr. Penry should live or die. These questions, which were to be answered simply "yes" or "no," asked the jury to determine whether Mr. Penry had deliberately killed Ms. Carpenter, whether he would probably commit acts of violence in the future, and whether the homicide was unreasonable in response to provocation by Ms. Carpenter. [R.I—118] The jury was told only to answer the questions and was not given any other way to speak to Mr. Penry's sentence. Under Texas law, if the questions are all answered affirmatively, the death sentence is mandatory. Tex. Code Crim. Proc. Ann. art. 37.071(e) (Vernon Supp. 1988).

The jury returned affirmative answers to all three questions after deliberating for only 46 minutes. [R.XVII—2697-2699] In light of the evidence presented and the narrow scope of the three questions, neither the answers themselves, nor the speed at which they were returned, is surprising. The Texas Court of Criminal Appeals characterized the special issue evidence as "overwhelming," and it was, absent an instruction to the jury authorizing the jury to consider and to give effect to the mitigating evidence. *Penry v. State*, 691 S.W. 636, 652-53 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 834 (1986).

B. In Addition To The Evidence Which Supported Affirmative Answers To The Special Issues, There Was Substantial Mitigating Evidence

Mitigating evidence is evidence relevant to the defendant's character, record, or the circumstances of the offense, which might serve as a basis for a sentence less than death. *See Skipper v. South*

Carolina, 106 S.Ct. 1669, 1671 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). A review of the record in Mr. Penry's case demonstrates that, in addition to the evidence which supported affirmative answers to the narrow special issues, there was also a substantial amount of relevant mitigating evidence before his sentencing jury. This evidence falls into two categories.

First, there was evidence that Mr. Penry was mentally impaired. Doctor Jose G. Garcia was a psychiatrist with extensive experience in examining and treating criminal offenders. Based on personal examination of Mr. Penry, and a study of his medical records dating back to 1965, he concluded that Mr. Penry was suffering from an organic brain disorder. The defect was probably acquired at birth, but could also have resulted from repeated physical abuse at an early age. [R.XVI—2161-62, 2135] Because of this organic impairment, Mr. Penry has no impulse control. No matter how hard he tries to behave properly, he cannot, and, because the damage is permanent, he will never improve or be cured. Unlike healthy people, Mr. Penry does not learn from experience. [R.XVI—2130-31] Over the years, Mr. Penry has been variously classified as mildly, moderately, and severely retarded. [R.XVI—2144-2149] Doctor Garcia described the practical effect of Mr. Penry's mental impairment:

We're talking about someone who could not function independently ever. And I mean literally and absolutely ever. There is just no way a person that has this type of intellectual functioning is going to be self-supporting, self-sufficient, self-caring at any time.

[R. XVI—2153]¹

In *California v. Brown*, 107 S.Ct. 837 (1987), Justice O'Connor recognized "the belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than

¹ The state called two psychiatric experts. Doctor Felix Peebles, Jr. agreed that Mr. Penry was suffering from moderate to mild mental retardation. [R.XVI—2377-79] Doctor Kenneth Vogtsberger agreed that Mr. Penry was unable to control his impulses, but found him only to be of below average intelligence, rather than retarded. [R.XVI—2334-35, 2342]

defendants who have no such excuse." *Id.* at 841 (O'Connor, J., concurring). See also *California v. Ramos*, 463 U.S. 992, 995 (1983) (mild congenital brain damage, low IQ borderline schizophrenia); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (diminished mental and emotional development). The sort of mental problem that Mr. Penry suffers from—a lifelong, incurable, organic brain disorder, which rendered him mentally retarded and unable to control his impulsive behavior—is just the sort of mental problem which might render a defendant less culpable than one without such an excuse. It is a valid mitigating circumstance in that it is relevant to an aspect of Mr. Penry's character which would tend to serve as a basis for a sentence less than death.

The second category of relevant mitigating evidence before this jury concerned Mr. Penry's troubled childhood. "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); see also *Burger v. Kemp*, 107 S.Ct. 3114, 3123, 3123 n.7 (1987) (evidence of "exceptionally unhappy and unstable childhood" is undoubtedly relevant mitigating evidence); *Hitchcock v. Dugger*, 107 S.Ct. 1821, 1824 (1987) (defendant as a child had abused drugs and came from a poor family).

The evidence that Mr. Penry had a troubled childhood was uncontroverted. Doctor Peebles, the state's expert, testified that Mr. Penry "had a very bad life generally, bringing up. He had been socially and emotionally deprived and he had not learned to read and write adequately." [R.XVI—2380] Medical records introduced at trial proved that from the age of 10 years old, Mr. Penry had been in and out of various mental institutions and schools, including the Austin State Hospital, the Rusk State Hospital, the Austin State School, the Mexia State School, and the Child and Adolescent Psychiatric Unit of the University of Texas Medical Branch at Galveston. [R.XVI—2122-26] His mother, who herself had a history of mental problems, testified that he had been abused by his father, that he had been regularly locked inside his bedroom at night, and that he had never successfully completed a single grade level in school. [R.XVI—2237, 2243-44, 2262] His sister testified that their mother had beaten Mr. Penry with a belt until he was physically scarred, and

that he had been locked up in his bedroom without access to a bathroom. [R.XVI—2277-79] His aunt testified that he had required constant care as a child, and that, when he was 14, she spent a full year just teaching him to write his name. [R.XVI—2308, 2314]

C. Although The Jury Had Relevant Mitigating Circumstances Before It, There Was No Way For The Jury To Consider And Act Upon This Evidence To Impose A Life Sentence

In *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), this Court held unconstitutional a death penalty scheme which permitted *no* consideration of “relevant facets of the character and record of the individual offender or the circumstances of the particular offense.” The Court, however, made no attempt at determining just what facets of an offender or an offense are relevant, and what degree of consideration is required, until *Lockett v. Ohio*, 438 U.S. 586 (1978). There the Court concluded “that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.* at 604 (emphasis in original).

At issue in *Lockett* was a statute which limited the capital sentencer to consideration of three statutory mitigating circumstances. In evaluating the constitutionality of this statute, the *Lockett* Court analyzed Sandra Lockett’s particular mitigating circumstances. She was young, she had played only a minor role in the offense, and there was no direct proof that she had intended to cause the death of the victim. Despite the fact that these circumstances were all relevant facets of the offender and her offense, under the Ohio death penalty scheme, they were not “permitted, as such, to affect the sentencing decision.” Instead of being given independent mitigating weight, as required by the Constitution, these circumstances were “relevant for mitigating purposes only if it is determined that [they] shed[] some light on one of the three statutory mitigating factors.” *Id.* at 608.

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

Id.

Ms. Lockett’s problem was that even though she presented several relevant mitigating circumstances which ought to have been considered by her sentencer, these circumstances were not considered because she failed to prove her entitlement to a life sentence under the three limited statutory issues. As a result she was condemned to death.

A similar situation arose in *Mills v. Maryland*, 108 S.Ct. 1860 (1988). In *Mills*, this Court considered the application of the Maryland statute to a defendant sentenced to death. The Court stated:

Under Maryland’s sentencing scheme, if the sentencer finds that any mitigating circumstance or circumstances have been proved to exist, it then proceeds to decide whether those mitigating circumstances outweigh the aggravating circumstances and sentences the defendant accordingly . . . But if the petitioner is correct, a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death . . . Under our decisions, it is not relevant whether the barrier to the sentencer’s consideration of all mitigating evidence is interposed by statute . . . ; by the sentencing court . . . ; or by an evidentiary ruling . . . The same must be true with respect to a single juror’s holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner’s interpretation of the sentencing process is correct, the conclusion would necessarily be the same: ‘Because the [sentencer’s] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.’ *Id.* at 1865-1866 (citations omitted).

As we will demonstrate, this is the identical problem faced by Mr. Penry in his case. Although he offered substantial and credible evidence of his mental impairment and troubled childhood, and although these are unquestionably relevant mitigating circumstances according to this Court, his sentencing jury was limited to the narrow special issues and was therefore unable to consider and give effect to these relevant mitigating circumstances as required by the Eighth and Fourteenth Amendments to the United States Constitution.

D. The Jury Was Told From The Beginning That Its Punishment Considerations Were Limited To The Three Special Issue Questions

From the moment the prospective jurors walked into the courtroom, they were told that their sentencing deliberations would be limited to three questions. The court instructed the venire that "the punishment is *determined* by the jury's answer to the three questions" [R.VIII—6, 9] [emphasis supplied] The state also was careful to tell the venirepersons that their sentencing considerations were restricted to the three special issues. Typical is the examination of Chris T. Burkholder, who became the foreperson of the jury. After Mr. Burkholder agreed that he could return a guilty verdict if convinced beyond a reasonable doubt, the following occurred:

Q And if the State went further and in the punishment and proved to your satisfaction that the answer to each of these questions beyond a reasonable doubt should be yes, could you return a verdict of yes on each of these questions, even though you knew that the Judge would automatically give the man the death penalty?

A Yes, sir. I could.

[R.X—877]

In accordance with these instructions, the court's charge on punishment was limited to the three special issues. The word "mitigation" is not mentioned in the charge. [R.I—117-119] The

trial court overruled all of Mr. Penry's objections to the charge, including that it failed to expressly require the jury to consider the mitigating circumstances. [R.XVII—2661-2662]

Finally, this effort to limit the jury's consideration was again repeated by the state during its summation. Mr. Keeshan stated, "I'm going to turn now pretty quickly to the three special issues you're concerned about in this case." [R.XVII—2667] And then he did so, spending the balance of his argument explaining why the answers to the questions should be "yes." [R.XVII—2668-2673] Mr. Price chided defense counsel for straying from the narrow issues in their argument:

I did not recall any of them discussing any fact issues, any evidence, and that's what you are about to do, go out and follow the instructions that the Court has given you. You all told us under oath on voir dire what your feelings were on the death penalty. I'm not going to argue the issue whether the death penalty is right or wrong. We've already discussed that individually, each one of us. You've all taken an oath to follow the law and you know what the law is. I'm not going to discuss that with you. You've all said you want to follow the law, and I trust that you will, and I know that you will. I didn't hear Mr. Newman or Mr. Wright say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all I asked you to do, is to go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason that you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case because, ladies and gentlemen, I submit to you we've met our burden. So, what we have here is about forty-five minutes of emotional argument, and that's what exactly it all boils down to, pleading to your emotions. And obviously, this is the type of subject that can be used to easily move you emotionally. It would move

anyone, and I think there would be something wrong with you, if you weren't at least concerned. But ladies and gentlemen, your job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly.

[R.XVII—2689-90]

Considering the narrowness of the special issues and the refusal of the trial court to explicitly instruct the jury to consider Mr. Penry's particularized mitigating circumstances, counsel had no legitimate framework upon which to base an argument. Indeed, counsel had no mechanism to ask the jury to consider Mr. Penry's mental disorder and his troubled childhood in the context of its analysis of the answers to the special issues. This is why Mr. Penry is before this Court.

E. Because Of The Nature Of Mr. Penry's Mitigating Evidence, There Is No Basis For Speculating That The Jury Considered It In Answering The Special Issues

The state will argue that, despite the fact that the jury was not explicitly instructed to consider mitigating circumstances, and despite the fact that the jury was repeatedly told that its considerations were limited to the three special issues, it is reasonable to believe that the jury considered Mr. Penry's retardation and childhood anyway in answering the questions. This is wrong for at least two reasons.

First, it is wholly speculative whether the jury considered these mitigating circumstances under the instructions it was given. Because the penalty of death is qualitatively different from all others, there is a heightened need for reliability in capital sentencing procedures. *E.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985); *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As Justice O'Connor has noted, a capital sentencing determination should not leave it to speculation

whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them to be insufficient to offset the aggravating circumstances

Woodson and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). Because Mr. Penry's jury was not instructed to consider his mitigating circumstances, it is at best ambiguous whether they were considered.

Second, apart from rank speculation, there is no logical reason to believe that Mr. Penry's jury viewed his mental impairment and troubled childhood as mitigating under the instructions given. In considering the propriety of a jury instruction, this Court asks how "a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). In this case, no reasonable juror could have interpreted the narrow special issues to permit the consideration of either Mr. Penry's mental impairment or his troubled childhood, "as a mitigating factor." *Lockett v. Ohio*, 438 U.S. at 604.

At first blush, special issue number one, which asks whether the defendant acted deliberately, may seem to comprehend mental impairment. "Deliberately" was not defined in the present case, as is customary in Texas. As a result, it is unknown what definition the jury gave the term. A rational juror might well have concluded that Mr. Penry intentionally and deliberately killed Ms. Carpenter. This same juror might well have thought that, because of this mental problem, Mr. Penry was "less culpable than defendants who have no such excuse." *California v. Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring). Under the narrow Texas special issue system, though, this juror, having found that Mr. Penry acted deliberately, would be unable to honestly give effect to his mitigating evidence.

Although his mental impairment was certainly relevant to special issue number two—future dangerousness—absent the requested instructions, no juror could have regarded that evidence

as a mitigating factor, as required by *Lockett*. Indeed, there is no reason to suggest that Mr. Penry's mental condition was considered by the jury or given any effect by the jury in regard to this special issue given the absence of the requested jury instructions.

As to special issue number three—provocation—Mr. Penry's mental disability could be viewed as mitigating evidence for answering it in the negative, but only if an instruction along the lines of the requested instruction had been given.

Much of the same can be said regarding the other category of mitigating evidence: his troubled childhood. The mitigating circumstances of Mr. Penry's background and childhood problems could not have had any effect on the jury's consideration of any of the special issues because the trial court failed to instruct the jury that they could give the mitigating circumstances any weight of any kind. Thus, absent an instruction to the jury as requested by Mr. Penry, a juror would have to answer the special issues "yes" even though he believed that Mr. Penry, because of the childhood abuse, was less morally culpable than someone who had not been abused.

F. Mr. Penry's Death Sentence Is Contrary To *Lockett* and Subsequent Cases From This Court

As shown above, the *Lockett* error in this case is that the jury was precluded from considering and acting upon the relevant mitigating circumstances of Mr. Penry's mental disability and troubled childhood because its sentencing deliberations were restricted to the three statutory special issues. As in *Lockett*, "[t]he limited range of mitigating circumstances which may be considered by the sentencer . . . is incompatible with the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. at 608.

Hitchcock v. Dugger, 107 S. Ct. 1821 (1987) is also relevant. There, the advisory jury was given a list of statutory mitigating circumstances which it was allowed to consider. The sentencing judge later announced that he was "mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances." *Id.* at 1824 (emphasis in original). This Court reversed the death sentence, holding that "it could not be clearer that the

advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* . . . *Eddings* . . . [and] *Lockett*" *Id.*

In a case like Mr. Penry's there is no perceptible difference between the Texas procedure, in which the jury is directed to answer "certain enumerated" statutory questions, and the procedure employed in *Hitchcock*. If there is a difference, it is only that the Texas system is even more restrictive, because in Florida the list of potentially mitigating circumstances is more comprehensive than are the Texas special issues. See *Hitchcock v. Dugger*, 107 S.Ct. at 1823 n.3.

Sumner v. Shuman, 107 S.Ct. 2716 (1987) articulates most graphically the constitutional fault in such a sentencing scheme. There the Court considered Nevada's capital procedure where death was mandatory upon a finding of two "indicators": conviction for murder while in prison under a statute which yielded a sentence of life imprisonment without parole. *Id.* at 2724. Finding that these two indicators "do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case," the death sentence was reversed.

Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 2725. Although the Texas statute clearly permits the jury to consider more potentially mitigating evidence than did the Nevada statute, its special issues are also "incomplete indicators," which are silent on the circumstances of the offender such as youth, intoxication, or mental condition. Accordingly, the narrow Texas

statute provides a constitutionally inadequate basis to determine the appropriateness of the death sentence.

G. The Fifth Circuit Recognized The Constitutional Problem In This Case

The court below appreciated the strength of Mr. Penry's constitutional complaint:

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

Penry v. Lynaugh, 832 F.2d at 924-25.

Although the court recognized the potential constitutional problem in *Penry*, it felt itself "bound by superior authority to reject his contention" *Id.* at 916-917.

A majority of the Texas Court of Criminal Appeals has consistently rejected challenges to article 37.071 like the one Mr. Penry is now making. *E.g.*, *Cordova v. State*, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987); *Demouchette v. State*, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986); *Clark v. State*, 717 S.W.2d 910, 920-921 (Tex. Crim. App. 1986), *cert. denied*, 107 S.Ct. 2202 (1987); *Anderson v. State*, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985), *cert. denied*, 107 S.Ct. 239 (1986); *Penry v. State*, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 834 (1986); *Stewart v. State*, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), *cert. denied*, 106 S.Ct. 190 (1985); *Williams v. State*, 622 S.W. 2d 116, 121 (Tex. Crim. App. 1981), *cert. denied*, 455 U.S. 1008 (1982).

Three judges on the court, however, have taken issue with the conclusion that the narrow special issues are sufficient by themselves to guide the jury on mitigating evidence:

If we are insure the constitutionality of 37.071, we must not only give lip service to broadly *interpreting* it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of *Lockett* and *Eddings* until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d at 125-26 (Clinton, J. joined by Teague and Miller, J.J., dissenting) (emphasis in original); *see also Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984) (Clinton, joined by Miller, J., concurring).

The specific concern of the minority was that certain evidence by its very nature "is at once damning and mitigating." *Stewart v. State*, 686 S.W.2d at 125. As examples, the dissenters listed the very circumstances found in Mr. Penry's case—mental disease and childhood deprivation. Although such factors might be mitigating in that they may lead the jury to exercise mercy, at the same time they may establish a probability of future dangerousness, thus compelling an affirmative answer to the second issue. According to these judges, the narrow Texas procedure does not permit the

jury to accord *independent weight* to all relevant mitigating circumstances, in violation of *Lockett v. Ohio*. *Id.* at 125-126. To insure that Texas procedure complies with *Lockett*, the dissenters would require an instruction on mitigating evidence. This is precisely Mr. Penry's contention.

H. *Jurek v. Texas* Need Not Be Overruled

As noted above, the Fifth Circuit clearly recognized the constitutional problem in this case. Beyond recognizing the problem, however, the court below was unwilling to grant Mr. Penry relief, feeling itself bound by superior authority. *Penry v. Lynaugh*, 832 F.2d at 916-17. The court indicated that the solution might require that *Jurek v. Texas* be reconsidered. Amicus respectfully disagrees that *Jurek* must be overruled in order to give Mr. Penry the relief he seeks.

In *Jurek*, this Court rejected a number of broad, *facial* challenges to the constitutionality of article 37.071. Among other things, the Court held that, based on the evidence then before it, it appeared that the Texas Court of Criminal Appeals was broadly interpreting the special issues to permit the consideration of particularized mitigating circumstances *Jurek v. Texas*, 428 U.S. 262, 272 (1976).

The Court in *Jurek* expressly relied on the Texas state court's interpretation of article 37.071 in holding that that statute provided the guidance required by the Constitution. As recognized two years later, in *Lockett v. Ohio*, 438 U.S. 586 (1978), article 37.071 survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider “whatever mitigating circumstances” the defendant might be able to show. *Id.* at 607.

Jurek was announced on July 2, 1976, the same date decisions were announced upholding the facial validity of the death penalty statutes of Georgia and Florida. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Lockett*, 438 U.S. 586 (1978), the Court remarked that “[n]one of [these]

statutes *clearly operated at that time* to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.” *Id.* at 607 (emphasis supplied).

Since 1976 this Court has re-examined both the Georgia and Florida statutes in light of subsequent construction by those states' courts. As a result, death sentences imposed upon prisoners in both states have been invalidated, notwithstanding the Court's earlier decisions in *Gregg* and *Proffitt*. See *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

It is time for a similar “as applied” examination of article 37.071. Such examination would show that in certain cases, the statute does not preclude the consideration of relevant mitigating circumstances. See e.g., *Franklin v. Lynaugh*, 108 S.Ct. 2320, 2332 (1988). In other cases, however, because of the nature of the particular evidence, the statute does operate to preclude the full consideration that the Constitution requires. Mr. Penry's case clearly falls into the latter category. His challenge, unlike Mr. Jurek's is not a facial one, but instead it complains of unconstitutional application in his case. See Petition for Writ of Certiorari, pp. 11, 13. Recognition that the Texas statute operated unconstitutionally against Mr. Penry will not mean that it operates unconstitutionally in all cases. Nor will such a decision require that *Jurek* be overruled, any more than *Godfrey* overruled *Gregg*, or *Hitchcock* overruled *Proffitt*.

I. *Franklin v. Lynaugh* is Limited To Its Facts

In *Franklin v. Lynaugh*, 108 S.Ct. 2320 (1988), petitioner raised a claim similar to the one now raised by Mr. Penry. A plurality of this Court rejected Mr. Franklin's claim, because it did not believe that the Texas special issue system “precluded jury consideration of any relevant mitigating circumstances *in this case*, or otherwise unconstitutionally limited the jury's discretion *here*.” *Id.* at 2332 (emphasis supplied). As the emphasized language indicates, the *Franklin* holding was expressly limited to its facts. Mr. Franklin presented two mitigating circumstances—“residual doubt” about his guilt and his good behavior in prison. All nine Justices rejected “residual doubt” as a constitutionally mandated

mitigating circumstance. And, the plurality found that since Mr. Franklin's prison record was fully considered by the jury when answering the second special issue, no further jury instruction was required. *Id.* at 2329.

There are two important distinctions between the present case and *Franklin*. First, unlike "residual doubt," this Court has expressly recognized that the circumstances proved by Mr. Penry—mental disability and troubled childhood—are relevant mitigating circumstances. See *Burger v. Kemp*, 107 S.Ct. 3114, 3123, 3123 n.7 (1987) (unhappy childhood); *Hitchcock v. Dugger*, 107 S.Ct. 1821, 1824 (1987) (childhood); *California v. Ramos*, 463 U.S. 992, 995 (1983) (mental impairment); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (troubled childhood and mental impairment). Second unlike the single valid mitigating circumstance found in *Franklin*, Mr. Penry's two circumstances were not fully considered by the narrow special issues.

It is also important to examine the concurring opinion in *Franklin*. Justice O'Connor, joined by Justice Blackmun, expressed doubts that the Texas capital sentencing scheme could "constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty." *Id.* at 2332. Justices O'Connor and Blackmun concurred in the judgement *only* because the prison-record evidence relied on by Mr. Franklin related solely to one of the special issue questions. But Justice O'Connor made this critical distinction:

If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

Id. at 2333.

That is, of course, precisely the kind of evidence presented by Mr. Penry in this case: some of the mitigating evidence may have been relevant to the special issues, but all of the mitigating evidence certainly was relevant to Mr. Penry's moral culpability beyond the scope of the special issues. Nevertheless, the jury was effectively precluded from considering all of the mitigating evidence and from giving effect to all of the mitigating evidence in determining whether Mr. Penry *would* live or die. Indeed, the jury was not allowed to say whether Mr. Penry's moral culpability was such that he *should* be allowed to live. Unlike *Franklin*, this case graphically illustrates that the constitutional doubts expressed by Justices O'Connor and Blackmun are well founded.

J. What Was The Jury To Do

The court below captured the problem in this case:

What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

Penry v. Lynaugh, 832 F.2d at 925. The court was right. There was no way for the jury fully and favorably to act on the mitigating circumstances of Mr. Penry's mental impairment and troubled youth. This was constitutional error. As a result, his conviction must be reversed and the cause remanded for a new trial.

Conclusion

The judgment of the United States Court of Appeals affirming the denial of the petition for writ of habeas corpus should be reversed.

Respectfully submitted:

Mark Stevens*
Bar No. 19184200
442 Dwyer Ave.
San Antonio, Texas 78204
(512) 226-1433

David Botsford
800 Southwest Tower
Seventh at Brazos
Austin, TX 78701
(512) 476-9121

Carolyn Garcia
2038 Lexington Street
Houston, Texas 77098
(713) 524-5007

*Counsel of Record

By _____
Mark Stevens

Attorneys for the Texas Criminal
Defense Lawyers Association

SEP 9 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY PAUL PENRY,
v. *Petitioner,*

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT
OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF OF AMERICAN ASSOCIATION ON MENTAL
RETARDATION, AMERICAN PSYCHOLOGICAL
ASSOCIATION, ASSOCIATION FOR RETARDED
CITIZENS OF THE UNITED STATES, THE
ASSOCIATION FOR PERSONS WITH SEVERE
HANDICAPS, AMERICAN ASSOCIATION OF
UNIVERSITY AFFILIATED PROGRAMS FOR THE
DEVELOPMENTALLY DISABLED, AMERICAN
ORTHOPSYCHIATRIC ASSOCIATION, NEW YORK
STATE ASSOCIATION FOR RETARDED CHILDREN,
INC., NATIONAL ASSOCIATION OF PRIVATE
RESIDENTIAL RESOURCES, NATIONAL ASSOCIATION
OF SUPERINTENDENTS OF PUBLIC RESIDENTIAL
FACILITIES FOR THE MENTALLY RETARDED,
MENTAL HEALTH LAW PROJECT, AND NATIONAL
ASSOCIATION OF PROTECTION AND ADVOCACY
SYSTEMS AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER**

Of Counsel:

BARBARA BERGMAN
DONALD N. BERSOFF

JAMES W. ELLIS
Counsel of Record
RUTH LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. THE DISABILITIES THAT ACCOMPANY MENTAL RETARDATION ARE DIRECTLY RELEVANT TO THE ISSUE OF CRIMINAL RESPONSIBILITY AND TO THE CHOICE OF PUNISHMENT FOR THOSE CONVICTED OF CRIMES	5
A. Mental Retardation Is A Substantial Disabil- ity Which Impairs An Individual's Capacity To Understand And Control His Actions.....	5
B. Mental Retardation Has Long Been Recog- nized As Relevant To The Choice of Appro- priate Punishment For Crime	9
II. THE DEGREE OF REDUCTION IN MORAL BLAMEWORTHINESS CAUSED BY A DEFENDANT'S MENTAL RETARDATION RENDERS IMPOSITION OF THE DEATH PENALTY UNCONSTITUTIONAL	11
A. Punishment By Death Is Reserved For Those Selected On The Basis Of Their Blameworth- iness And Moral Guilt	11
B. The Death Penalty Is Disproportionate To The Degree Of Culpability Of Any Defend- ant With Mental Retardation	13
III. A RULING THAT THE EIGHTH AMEND- MENT BARS THE EXECUTION OF PEOPLE WITH MENTAL RETARDATION IS APPRO- PRIATE AND NECESSARY	16
IV. EXECUTION OF A PERSON WITH MENTAL RETARDATION SERVES NO VALID PENO- LOGICAL PURPOSE	19
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Booth v. Maryland</i> , 107 S. Ct. 2529 (1987)	12
<i>California v. Brown</i> , 107 S. Ct. 837 (1987)	11-12, 12-13
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985)	6
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	5, 16, 18, 19, 20
<i>Coleman v. United States</i> , 357 F.2d 563 (D.C. Cir. 1965)	9
<i>Commonwealth v. Green</i> , 396 Pa. 137, 151 A.2d 241 (1959)	6
<i>Commonwealth v. Irelan</i> , 341 Pa. 43, 17 A.2d 897 (1941)	10
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	12, 16, 18, 19
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	19-20
<i>Franklin v. Lynaugh</i> , 108 S. Ct. 2320 (1988)	18
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	11
<i>Giles v. State</i> , 261 Ark. 413, 549 S.W.2d 479 (1977)	10
<i>Hitchcock v. Dugger</i> , 107 S. Ct. 1821 (1987)	6
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	10
<i>Miller v. State</i> , 373 So. 2d 882 (Fla. 1979)	18
<i>Pickett v. State</i> , 37 Ala. App. 410, 71 So. 2d 102 (1953)	15
<i>Regina v. Higginson</i> , 174 Eng. Rep. 743 (1843)	19
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984)	11
<i>State v. Behler</i> , 65 Idaho 464, 146 P.2d 338 (1944) ..	10
<i>State v. Hall</i> , 176 Neb. 295, 125 N.W.2d 918 (1964)	10
<i>Sumner v. Shuman</i> , 107 S. Ct. 2716 (1987)	11
<i>Thomas v. State</i> , 97 Tex. Crim. 432, 262 S.W. 84 (1924)	9
<i>Thompson v. Oklahoma</i> , 108 S. Ct. 2687 (1988)	passim
<i>Tison v. Arizona</i> , 107 S. Ct. 1676 (1987)	12, 19
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) ..	11
STATUTES	
Ga. Code Ann. § 17-7-131 (j) (1988 Supp.)	17
18 U.S.C. § 17 (a) (Supp. IV 1986)	9

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS	Page
A.B.A. Standards for Criminal Justice 7-5.6 (1987)	20
A.B.A. Standards for Criminal Justice 7-9.3 (1984)	9
American Association on Mental Deficiency, <i>Classification in Mental Retardation</i> (H. Grossman, ed. 1983)	5
Biklen & Mlinarcik, <i>Criminal Justice, Mental Retardation and Criminality: A Causal Link?</i> , 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978)	8
4 W. Blackstone, <i>Commentaries</i> *24	9
Blume & Bruck, <i>Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis</i> , 41 Ark. L. Rev. 725 (1988)	18
J. Conroy & V. Bradley, <i>Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis</i> (1985)	6
M. Dalton, <i>The Country Justice</i> (1619 & photo. reprint 1973)	9
Ellis & Luckasson, <i>Mentally Retarded Criminal Defendants</i> , 53 Geo. Wash. L. Rev. 414 (1985) ..	8, 13
<i>Georgia To Bar Executions of Mentally Retarded Killers</i> , N.Y. Times, Apr. 12, 1988, at A26, col. 4	17
Haywood & Switzky, <i>Intrinsic Motivation and Behavior Effectiveness in Retarded Persons</i> , 14 Int'l Rev. Research Mental Retardation 2 (N. Ellis & N. Bray eds. 1986)	14
Israely, <i>The Moral Development of Mentally Retarded Children: Review of the Literature</i> , 14 J. Moral Educ. 33 (1985)	8
S. Kirk & J. Gallagher, <i>Educating Exceptional Children</i> (1983)	7

TABLE OF AUTHORITIES—Continued

	Page
Kohlberg, <i>Moral Stages and Moralization: The Cognitive-Developmental Approach</i> , in <i>Moral Development and Behavior: Theory, Research and Social Issues</i> 31 (T. Lickona ed. 1976)	8
K. Lewin, <i>A Dynamic Theory of Personality</i> (1936)	7
Lind & Smith, <i>Moral Reasoning and Social Functioning Among Educable Mentally Handicapped Children</i> , 10 <i>Austl. & N. Zealand J. Developmental Disabilities</i> 209 (1984)	8
Litrownik, Freitas, & Franzini, <i>Self-Regulation in Mentally Retarded Children: Assessment and Training of Self-Monitoring Skills</i> , 82 <i>Am. J. Ment. Defic.</i> 499 (1978)	7
<i>Lives in Process: Mildly Retarded Adults in a Large City</i> (R. Edgerton ed. 1984)	14
Mahoney & Mahoney, <i>Self Control Techniques with the Mentally Retarded</i> , 42 <i>Exceptional Children</i> 338 (1976)	7
C. Mercer & M. Snell, <i>Learning Theory Research in Mental Retardation</i> (1977)	7
J. Piaget, <i>The Moral Judgment of the Child</i> (Free Press ed. 1965)	8
Polloway & Smith, <i>Changes in Mild Mental Retardation: Population, Programs, and Perspectives</i> , 50 <i>Exceptional Children</i> 149 (1983)	14
Rueda & Zucker, <i>Persuasive Communication Among Moderately Retarded and Nonretarded Children</i> , 19 <i>Educ. & Training Ment. Retarded</i> 125 (1984)	7
S. Sarason, <i>Psychological Problems in Mental Deficiency</i> (3d ed. 1959)	7
Spitz & Borys, <i>Performance of Retarded Adolescents and Nonretarded Children on One- and Two-Bit Logical Problems</i> , 23 <i>J. Exper. Child Psychol.</i> 415 (1977)	14

TABLE OF AUTHORITIES—Continued

	Page
Spitz, <i>Intellectual Extremes, Mental Age, and the Nature of Human Intelligence</i> , 28 <i>Merrill-Palmer Q.</i> 167 (1982)	6, 14
<i>Systematic Instruction of Persons with Severe Handicaps</i> (M. Snell 3d ed. 1987)	6
D. Wechsler, <i>The Measurement and Appraisal of Adult Intelligence</i> (4th ed. 1958)	14
White, <i>Critical Influences in the Origins of Competence</i> , 21 <i>Merrill-Palmer Q.</i> 243 (1975)	6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-6177

JOHNNY PAUL PENRY,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT
OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION
ON MENTAL RETARDATION, *ET AL.*
IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae are professional and voluntary associations interested in people with mental retardation. They represent a broad spectrum of viewpoints within the field of mental retardation.¹

THE AMERICAN ASSOCIATION ON MENTAL
RETARDATION (AAMR), previously named the Amer-

¹ The Petitioner and Respondent in this case have consented to the filing of this brief.

ican Association on Mental Deficiency, is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation and has appeared before this Court as *amicus curiae* in cases such as *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Bowen v. American Hospital Association*, 476 U.S. 610 (1986).

THE AMERICAN PSYCHOLOGICAL ASSOCIATION (APA) is a nonprofit, scientific and professional organization. With over 70,000 members, it is the major association of psychologists in the United States. This case is of special interest to the APA Division on Mental Retardation, as well as thousands of other APA members who are engaged in scholarly research and the development of people with mental retardation.

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES (ARC) is a national voluntary association of parents, families and friends of people with mental retardation, along with members who have mental retardation. ARC, which has a national membership of over 160,000 people organized in some 1,300 local and state-wide chapters, is directed and led by active volunteer parents.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000 teachers, researchers, administrators, parents, medical personnel, and other professionals dedicated to making appropriate education and services available to persons who experience severe disabilities.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of more than 10,000 mental health professionals, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes, and treatment of mental disabilities, including mental retardation.

THE NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC. (NYSARC) is a state-wide organization of 65 chapters and 53,000 members, including parents and others concerned with the needs of people who have mental retardation. NYSARC provides services to 25,000 clients on a daily basis and is also an advocacy organization. (NYSARC is not affiliated with the Association for Retarded Citizens of the United States.)

THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES represents approximately 650 agencies in 49 states and the District of Columbia that together provide residential services to more than 40,000 people with mental retardation and other developmental disabilities. Members offer a full range of residential services in a variety of settings designed to enhance the development and independence of those served.

THE NATIONAL ASSOCIATION OF SUPERINTENDENTS OF PUBLIC RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED is composed of approximately 200 directors of public facilities which serve people with mental retardation.

THE MENTAL HEALTH LAW PROJECT is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, including *Addington v. Texas*, *O'Connor v. Donaldson*, and *Bowen v. City of New York*. It has participated as *amicus curiae* in this Court in more than a dozen additional cases.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS represents Protection and Advocacy systems in 50 states and six territories, created pursuant to Section 113 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6042 (Supp. II 1982). These agencies have the statutory mandate to advocate for the rights of persons with developmental disabilities, including mental retardation.

Amici agree with Petitioner that he is entitled to a reversal on the first question on which certiorari was granted, because the Texas system does not allow jurors to give adequate consideration to mental retardation as a mitigating factor, but *amici* will limit this brief to an analysis of whether the execution of a person with mental retardation is invariably a violation of the Eighth Amendment, as applied to the states by the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The Eighth Amendment limits the imposition of the death penalty to those defendants whose blameworthiness is proportional to society's most extreme and irrevocable sanction. This Court has held death to be a disproportionate punishment where the characteristics of the offense or of the offender did not match the high level of culpability required by the Constitution.

Capital defendants who have mental retardation lack this constitutionally required level of blameworthiness. The effects of their disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect make it impossible for them to possess that level of culpability essential in capital cases.

The execution of a person with mental retardation, such as Johnny Paul Penry, cannot serve any valid penological purpose, and as a result it is "nothing more than the purposeless and needless imposition of pain and suf-

fering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Such an execution offends modern standards of decency.

ARGUMENT

I. THE DISABILITIES THAT ACCOMPANY MENTAL RETARDATION ARE DIRECTLY RELEVANT TO THE ISSUE OF CRIMINAL RESPONSIBILITY AND TO THE CHOICE OF PUNISHMENT FOR THOSE CONVICTED OF CRIMES.

A. Mental Retardation Is A Substantial Disability Which Impairs An Individual's Capacity To Understand And Control His Actions.

Every individual who has mental retardation experiences a substantial disability in cognitive ability and adaptive behavior. The universally accepted definition requires that any person who is classified as mentally retarded must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and requires that the disability must have been "manifested during the developmental period." American Association on Mental Deficiency [now Retardation], *Classification in Mental Retardation* 1 (H. Grossman ed. 1983) (hereafter cited as "AAMR, *Classification*"). This means that a mentally retarded individual's measured intelligence is at least two standard deviations below the average person's.²

² General intellectual functioning is measured by IQ tests, and to be classified as having mental retardation, a person generally must score below 70 (depending on which test is employed). The average IQ for the overall population is 100; more than 97 percent of all persons score above 70.

Persons with IQ scores between 70 and 85 are sometimes erroneously described as having "borderline retardation," but this classification has long since been abandoned by professionals in the field. AAMR, *Classification* at 6. Individuals with IQ scores in the 70s and 80s, while not mentally retarded, do have reduced cognitive ability, although the reduction is not as severe as for those who have

People with mental retardation are capable of learning, working, and living in their communities. See generally J. Conroy & V. Bradley, *Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (1985); *Systematic Instruction of Persons with Severe Handicaps* (M. Snell 3d ed. 1987). Special educators and other professionals have made substantial advances in developing techniques to assist people with mental retardation, and legislatures have acted to attempt to assist such individuals. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (1985). But advances in our capacity to help people with this disability do not change the reality that mental retardation is a substantial disability and that people who have mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne*, 473 U.S. at 442.

This reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation. Among the many substantial intellectual impairments resulting from mental retardation, the most serious occur in logical reasoning, strategic thinking, and foresight. Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 *Merrill-Palmer Q.* 167, 178 (1982). The ability to anticipate consequences is a skill requiring intellectual and developmental ability. White, *Critical Influences in the Origins of Competence*, 21 *Merrill-Palmer Q.* 243, 246 (1975). A defendant in a

mental retardation. Mental disability that falls short of mental retardation should be considered as a mitigating circumstance at the penalty phase of capital trials, just as the youth of a person who is 19 or 20 should be considered. See, e.g., *Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987); see also *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959) (chronological age of 15 not enough to preclude death penalty, but an IQ of 80 tips the balance to require life imprisonment).

capital case whose understanding of causation and ability to predict consequences are substantially limited by mental retardation lacks an essential ingredient of culpability.

The problems caused by a mentally retarded defendant's substantial intellectual deficits are aggravated by intellectual rigidity, which is often demonstrated by an impaired ability to learn from mistakes and a pattern of persisting in behaviors even after they have proven counterproductive or unsuccessful. See generally K. Lewin, *A Dynamic Theory of Personality* (1936); S. Sarason, *Psychological Problems in Mental Deficiency* (3d ed. 1959); Rueda & Zucker, *Persuasive Communication Among Moderately Retarded and Nonretarded Children*, 19 *Educ. & Training Ment. Retarded* 125 (1984). One feature of this rigidity is that a person who has mental retardation often cannot independently generate in his mind a sufficient range of behaviors from which to select an action appropriate to the situation he faces (particularly a stressful situation).

A related consequence of mental retardation is impairment in the ability to control impulsivity. See S. Kirk & J. Gallagher, *Educating Exceptional Children* 144 (1983); Litrownik, Freitas, & Franzini, *Self-Regulation in Mentally Retarded Children: Assessment and Training of Self-Monitoring Skills*, 82 *Am. J. Ment. Defic.* 499 (1978); Mahoney & Mahoney, *Self Control Techniques with the Mentally Retarded*, 42 *Exceptional Children* 338 (1976). This appears to be related to problems that people with mental retardation encounter in attention span, attention focus, and selectivity in the attention process. See generally C. Mercer & M. Snell, *Learning Theory Research in Mental Retardation* 94-141 (1977). Such an impairment in the area of impulsivity is, of course, directly relevant to the level of an individual's ability to conform his conduct to the law's requirements and therefore to the degree of a defendant's culpability.

Moral development is also affected by mental retardation. It is widely accepted by researchers that moral reasoning ability develops in stages, incrementally over time, and is dependent on an individual's intellectual ability and developmental level. J. Piaget, *The Moral Judgment of the Child* (Free Press ed. 1965); Kohlberg, *Moral Stages and Moralization: The Cognitive Developmental Approach*, in *Moral Development and Behavior: Theory, Research and Social Issues* 31 (T. Lickona ed. 1976). Thus, mental retardation limits the ability of individuals to reach full moral reasoning ability. See Israely, *The Moral Development of Mentally Retarded Children: Review of the Literature*, 14 J. Moral Educ. 33 (1985); Lind & Smith, *Moral Reasoning and Social Functioning Among Educable Mentally Handicapped Children*, 10 Austl. & N. Zealand J. Developmental Disabilities 209 (1984). This does not mean, of course, that people with mental retardation are immoral or that they should escape responsibility for their actions. But it does mean that where mental retardation has placed an upper limit on a defendant's attainment of full moral reasoning ability, he cannot be held to have that level of culpability that would justify punishment by death.

Nor do amici contend that people with mental retardation are unusually likely to commit crimes.³ Most people with mental retardation are law abiding. A complex mix of environmental influences and individual differences unrelated to intelligence determines whether individuals engage in criminal acts. But those individuals with mental retardation who do commit crimes do so with a limited

³ The false belief, widely held in the early years of this century, that mental retardation was a cause of much of society's criminality is now understood to be a result of the eugenics hysteria of that era. Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978); Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 425-26 (1985).

understanding of causes and effects and a reduced ability to govern their own behavior.

A minimal level of cognitive ability and moral reasoning development are necessary for the level of culpability that will satisfy the requirements of the Eighth Amendment in capital cases. Defendants with mental retardation have serious impairments in intellectual and moral reasoning, strategic thinking, and the ability to foresee consequences. The combination of these substantial limitations is directly relevant to the degree of the disabled defendant's moral culpability for his criminal actions.

B. Mental Retardation Has Long Been Recognized As Relevant To The Choice Of Appropriate Punishment For Crime.

For centuries, Anglo-American law has accepted the principle that the degree of criminal culpability of people with mental retardation is reduced by the effect of their disability. The common law exempted "idiots" from criminal responsibility. 4 W. Blackstone, *Commentaries* *24; M. Dalton, *The Countrey Justice* 223 (1619 & photo. reprint 1973). When English law adopted the *M'Naghten* test for insanity, courts almost immediately extended its applicability to mentally retarded defendants. *Regina v. Higginson*, 174 Eng. Rep. 743 (1843). The modern American formulations of the insanity defense almost invariably speak in terms of "mental disease or defect," the latter referring to defendants with mental retardation. See, e.g., 18 U.S.C. § 17(a) (Supp. IV 1986). Similarly, the weight of authority holds that even when it does not constitute a complete defense, a defendant's mental retardation should be taken into account as a mitigating factor in determining an appropriate sentence. See, e.g., *Coleman v. United States*, 357 F.2d 563, 569 (D.C. Cir. 1965); *Thomas v. State*, 97 Tex. Crim. 432, 262 S.W. 84 (1924) (evidence of "a low order of mentality"); *A.B.A. Standards for Criminal Justice* 7-9.3 (1984). See gen-

erally *Lockett v. Ohio*, 438 U.S. 586 (1978) ("mental deficiency" was one of the mitigating factors that had been prescribed by the Ohio statute). Even before this Court held that the Constitution required consideration of mitigating evidence, state appellate courts reduced sentences of death to life imprisonment on the basis of the mitigating effect of a defendant's mental retardation. *E.g. State v. Behler*, 65 Idaho 464, 146 P.2d 338 (1944); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964). *Cf. Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977) (post-Gregg).

The reason that mental retardation has been so widely accepted as relevant to the degree of punishment, whether through a finding of nonresponsibility or mitigation, is that courts and legislatures have recognized the disability's relationship to the degree of a defendant's blameworthiness. For example, the Supreme Court of Pennsylvania vacated a death sentence because expert testimony showed that the defendant's subnormal intelligence produced "a smaller range of selectivity as to action than would be had by the average human being" (quoting expert testimony) and meant that the defendant lacked "the ability to think things through to a logical conclusion." *Commonwealth v. Irelan*, 341 Pa. 43, 46, 17 A.2d 897, 898 (1941) (involving a defendant whose mental disability apparently was less severe than actual mental retardation).

American law has never held, nor do amici contend, that people with mental retardation cannot be held responsible or punished for criminal acts they commit. Some defendants who have mental retardation are entitled to acquittal because the effect of their disability matches the jurisdiction's test for insanity or because they lack the requisite *mens rea*. Other mentally retarded defendants properly can be convicted and subject to appropriate punishment. But mental retardation always involves a substantial impairment that reduces a

defendant's level of blameworthiness and moral culpability for a capital offense.

II. THE DEGREE OF REDUCTION IN MORAL BLAME-WORTHINESS CAUSED BY A DEFENDANT'S MENTAL RETARDATION RENDERS IMPOSITION OF THE DEATH PENALTY UNCONSTITUTIONAL.

A. Punishment By Death Is Reserved For Those Selected On The Basis Of Their Blameworthiness And Moral Guilt.

Unique considerations attend issues that determine which defendants may be put to death. As this Court has observed, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Therefore, the flexibility that states have in devising appropriate sentences for noncapital cases is more strictly circumscribed in cases which may result in a death sentence.

Under modern capital punishment statutes, only a small minority of those individuals who commit willful criminal homicide are actually sentenced to death. *See Thompson v. Oklahoma*, 108 S. Ct. 2687, 2697 (1988) (plurality opinion). This Court has made clear that States cannot select candidates for the death penalty in an arbitrary or unprincipled fashion or solely on the basis of the offense committed. *Furman v. Georgia*, 408 U.S. 238 (1972); *Sumner v. Shuman*, 107 S. Ct. 2716 (1987). "There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984).

This Court's Eighth Amendment opinions make clear that the decision to impose the death penalty must be "directly related to the personal culpability of the crimi-

nal defendant." *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). The Court has reversed death sentences that were based on factors unrelated to the defendant's blameworthiness. *Booth v. Maryland*, 107 S. Ct. 2529 (1987). The degree of a defendant's blameworthiness and moral culpability are thus the key criteria for determining who may be put to death and who may not. *Enmund v. Florida*, 458 U.S. 782 (1982).⁴

A principal component of any defendant's culpability is his mental ability and state of mind at the time of the offense. This Court has observed that:

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.

Tison v. Arizona, 107 S. Ct. 1676, 1687 (1987).

The obverse is equally true; a substantial reduction in the purposefulness of a defendant's criminal acts or impairment in his comprehension of them and their consequences must surely indicate that a less severe penalty is warranted. Cf. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698-99 (1988) (plurality opinion). As Justice O'Connor has observed, our society long ago agreed "that defendants who commit criminal acts that are attributable to . . . mental problems[] may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected

⁴ *Tison v. Arizona*, 107 S. Ct. 1676 (1987), which distinguished *Enmund*, does not weaken its central holding that a defendant's moral culpability is the key criterion for imposing the death penalty. In *Tison*, the Court found that the defendants' conduct was "sufficient to satisfy the *Enmund* culpability requirement." 107 S. Ct. at 1688.

in Anglo-American jurisprudence." *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). Mental retardation significantly affects the degree of purposefulness and impairs the comprehension of every defendant who has the disability and commits a capital offense.

B. The Death Penalty Is Disproportionate To The Degree Of Culpability Of Any Defendant With Mental Retardation.

No defendant who has mental retardation is "capable of acting with the degree of culpability that can justify the ultimate penalty." *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2692 (1988) (plurality opinion).

Amici acknowledge that there is substantial variation among people with mental retardation regarding the degree of their disability and its effect on their reasoning capacity and adaptive behavior. Individuals with IQs in the 50s or 60s differ substantially from persons with IQs in the range of "profound" mental retardation.⁵ But this variation would be relevant to the Eighth Amendment issue only if some individuals in the "mild" mental retardation category had such minimal disabilities that they were capable of the level of culpability and moral blameworthiness required for the death penalty. This

⁵ The AAMR classification system divides people with mental retardation into four categories: mild, moderate, severe and profound. "Mild" mental retardation includes individuals with IQ scores between approximately 50 or 55 and 70. "Moderate" mental retardation includes those whose IQ scores are between approximately 35 or 40 and 50 or 55. (The precise boundaries depend on the particular intelligence test that is employed.) AAMR, *Classification* at 13. "[C]riminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability." Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 423 (1985). Approximately 89 percent of people who have mental retardation fall within the "mild" mental retardation category.

is not true. The highest functioning individuals in the "mild" mental retardation category have substantial cognitive and behavioral disabilities. See Polloway & Smith, *Changes in Mild Mental Retardation: Population, Programs, and Perspectives*, 50 *Exceptional Children* 149 (1983); *Lives in Process: Mildly Retarded Adults in a Large City* (R. Edgerton ed. 1984).

Comparison with nonretarded teenagers may illuminate this issue.⁶ Most teenagers are of average intelligence,

⁶ The question upon which this Court granted certiorari is framed in terms of "an individual with the reasoning capacity of a seven year old." This is similar to the concept of mental age, a tool used in the field of mental retardation to describe the severity of an individual's disability. Mental age is calculated as the chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation. See D. Wechsler, *The Measurement and Appraisal of Adult Intelligence* 24 (4th ed. 1958). The equivalence between nonretarded children and retarded adults is, of course, imprecise. An individual's mental age can simultaneously underestimate and overestimate attributes of the adult to whom it is applied. An adult will have the physical development and some of the interests and experiences of his non-disabled age peers; mental age suggests underestimation in these areas. But mental age substantially overestimates important problem-solving abilities. Mental age markedly overstates the ability of adults with mental retardation to use logic and foresight in solving problems. See, e.g., Spitz & Borys, *Performance of Retarded Adolescents and Nonretarded Children on One- and Two-Bit Logical Problems*, 23 *J. Exper. Child Psychol.* 415, 428 (1977); Haywood & Switzky, *Intrinsic Motivation and Behavior Effectiveness in Retarded Persons*, 14 *Int'l Rev. Research Mental Retard'n* 1 (N. Ellis & N. Bray eds. 1986). See generally Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 *Merrill-Palmer Q.* 167, 178 (1982).

Courts appear to have grasped intuitively the strengths and weaknesses of mental age as an estimation of disability. They have rejected claims that an adult with a mental age below 12 automatically lacks criminal responsibility because children of a similar chronological age are deemed incapable of criminal intent. But courts have frequently used mental age as a shorthand description of an individual's level of reasoning ability when discussing issues

and a minority (as with any age group) have superior intelligence. The common trait of teenagers is relative immaturity (although a few are unusually mature or sophisticated). *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2709 (1988) (O'Connor, J., concurring in the judgment). But their lives have been lived with varying degrees of mental ability, and those varying abilities produce differences in their life experiences. By contrast, people with mental retardation *never* have average, let alone superior, intelligence. The result of this impairment is that their abilities to comprehend concepts such as causation will vary but will never rise above a certain ceiling. The substantial variation among people with mental retardation always occurs below that ceiling. Thus, all persons with mental retardation lack that level of ability that would allow them to be capable of the level of culpability required for the death penalty.

The essence of *amici's* argument is not that jurors, or this Court, should feel sorry for capital defendants with mental retardation and as a result exempt them from the death penalty. Some jurors may reach that conclusion after hearing evidence about a defendant's disability in argument for mitigation. Rather, *amici's* Eighth Amendment argument is wholly different. The nature of mental retardation is sufficiently severe that any person who has that disability and commits a capital offense lacks, by definition, that level of culpability that would allow the state to take his life. Therefore, the case involving people with mental retardation bears no resemblance to hypothetical arguments that "blind people . . . or white-haired grandmothers . . . or mothers of two-year-olds" or "other appealing groups" should be spared from execution. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2721 (1988) (Scalia, J., dissenting). None of these

such as voluntariness of confessions, competence to stand trial, mitigation, and the insanity defense. See, e.g., *Pickett v. State*, 37 Ala. App. 410, 71 So. 2d 102 (1953).

groups uniformly lacks the ability necessary to achieve the Eighth Amendment's required level of culpability. *Amici's* argument arises not from the "appeal" or sympathetic character of people with mental retardation, but rather from the real and practical effects of their disability.

III. A RULING THAT THE EIGHTH AMENDMENT BARS THE EXECUTION OF PEOPLE WITH MENTAL RETARDATION IS APPROPRIATE AND NECESSARY.

This Court has held that the death penalty violates the Eighth Amendment if it is disproportionate to the circumstances of the case for which it is prescribed. Most frequently, this is because of characteristics of the offense. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). The death penalty may also be excessive and therefore unconstitutional because of characteristics of the defendant for whom it is proposed. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

Although the Court has repeatedly emphasized the importance of individualized determinations of culpability through the system of weighing aggravating and mitigating circumstances, each of these holdings is categorical in nature. It is significant that in each instance, the claim of disproportionality was available in individual cases as an argument for mitigation. The cases reached this Court, and merited its attention, only because the system of considering mitigating circumstances did not invariably preclude the death penalty under the circumstances at issue. Even if most jurors (or most voters or legislators) would conclude, if asked, that the death penalty was inappropriate for non-murdering rapists, peripheral participants in crimes that led to homicides, or children under the age of 16, some trials may still result in a sentence of death under those circumstances. This Court's rulings teach that a function of the Con-

stitution's ban on cruel and unusual punishment is to reflect society's "evolving standards of decency" and to impose them where the system of considering mitigating circumstances in individual cases has failed to reflect those standards by prescribing punishment that is clearly disproportionate to the defendant's culpability.⁷

The possibility that a person with mental retardation could be executed in America has only recently become apparent. The first modern case to receive any substantial publicity was Georgia's execution of Jerome Bowden in 1986, and in that case, the existence and degree of his disability (IQ 65) were not recognized widely in Georgia until after his death. In response to the outrage that many expressed at the spectacle of a person so disabled being executed, Georgia passed a statute banning the execution of people with mental disability. Ga. Code Ann. § 17-7-131(j) (1988 Supp.); *Georgia To Bar Executions of Mentally Retarded Killers*, N.Y. Times, April 12, 1988, at A26, col. 4. Legislatures in other states have not "rendered a considered judgment approving the imposition of capital punishment" on people with mental retardation because the reality of this possibility has not been apparent. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2708 (1988) (O'Connor, J., concurring in the judgment). Polling data strongly indicate that when supporters of the death penalty are asked whether they approve of the execution of people with mental retardation, they oppose

⁷ In each of these cases, the Court has banned the use of the death penalty under the circumstances in question. In his dissenting opinion in *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2712 (1988), Justice Scalia raises the possibility of a rebuttable presumption regarding a defendant's culpability that could be grounded in the Eighth Amendment. *Amici* strongly believe that the Eighth Amendment should be held to preclude any execution of a person with mental retardation, and we are unclear about how such a rebuttable presumption would be structured and implemented. The possibility of such a presumption has not been argued in this case, nor has it been considered by the courts below.

such sentences. Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark. L. Rev. 725, 759-60 (1988) (reporting results of scientific surveys).⁸

Despite the consensus that is now becoming apparent, people with mental retardation may still be sentenced to death. Just as the mitigation system was inadequate to prevent unconstitutionally disproportionate punishment of defendants in *Coker*, *Enmund*, and *Thompson*, Johnny Paul Penry's presence on Death Row demonstrates that the system of considering factors in mitigation cannot be relied upon exclusively to assure that defendants with mental retardation will not be executed.⁹ Jurors in an individual case may be confused about the relevance of mental retardation to culpability and may even believe perversely that it should be considered as an aggravating circumstance. Cf. *Miller v. State*, 373 So. 2d 882 (Fla. 1979). Similarly, reviewing appellate courts may misperceive the impact of mental retardation on culpability.

⁸ The identifiable objective indicia of societal opinions on this question, while consistent, are less numerous than those available, for example, on the issue of executing minors. However, this Court has indicated that it looks to objective indicators as part of its own process of deciding whether a punishment is excessive, but that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" in particular circumstances. *Enmund v. Florida*, 458 U.S. 782, 797 (1982). In the case at bar, the objective indicia are not numerous because the possibility of a person with mental retardation being executed has only recently become clear. Once the prospect becomes clear, the indicia suggest that Americans consistently reject the execution of persons with mental retardation.

⁹ *Amici* acknowledge that the instant case may not be an ideal vehicle for resolving the Eighth Amendment issue, since the Texas system of jury instructions may give jurors inadequate opportunity to evaluate the relevance of mental retardation as a mitigating circumstance. See *Franklin v. Lynaugh*, 108 S. Ct. 2320, 2333 (1988) (O'Connor, J., concurring in the judgment).

IV. EXECUTION OF A PERSON WITH MENTAL RETARDATION SERVES NO VALID PENOLOGICAL PURPOSE.

The principal reason that *amici* have concluded that execution of a person with mental retardation violates the Eighth Amendment is that it is "grossly out of proportion" to such a defendant's culpability. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). But *Coker* also made clear that a punishment is unconstitutionally excessive if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Id.* The death penalty for people with mental retardation also violates this principle.

This Court has held that retribution is a valid penological purpose, and that in proper cases it can support imposition of the death penalty. But this Court has also concluded that valid exercise of the state's interest in retribution must be related to the degree of the defendant's blameworthiness. *Enmund v. Florida*, 458 U.S. 782, 800 (1982). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 S. Ct. 1676, 1683 (1987).

Deterrence has also been recognized as an acceptable purpose for punishment. But the likelihood that an individual with mental retardation would be deterred from committing a capital offense by the prospect of the death penalty is even smaller than was true for teenagers, since some teenagers have above average intelligence. Cf. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (plurality opinion). Similarly, removing the small number of capital offenders with mental retardation from the prospect of execution "will not diminish the deterrent value of capital punishment for the vast majority of [nonretarded] potential offenders." *Id.* See generally *Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (citing

Sir Edward Coke for the proposition that execution of an insane person is "a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others"); *A.B.A. Standards For Criminal Justice* 7-5.6 (1987) (opposing execution of inmates whose incompetence results from either mental illness or mental retardation).

Amici believe that execution of a person with mental retardation is invariably disproportionate to the level of that individual's culpability and is nothing more than the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592. Therefore, we believe that this Court should hold that such executions violate the Eighth Amendment's ban on cruel and unusual punishments.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
RUTH LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:

BARBARA BERGMAN
DONALD N. BERSOFF

September, 1988

APPENDIX

AMERICAN ASSOCIATION ON MENTAL RETARDATION RESOLUTION ON MENTAL RETARDATION AND THE DEATH PENALTY JANUARY, 1988

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION, the nation's oldest and largest interdisciplinary organization of mental retardation professionals, has long been active in advocating the full protection of the legal rights of persons with mental retardation.

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION recognizes that, archaic stereotypes and prejudices to the contrary notwithstanding, the vast majority of people with mental retardation are not prone to criminal or violent behavior.

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION recognizes that some people with mental retardation become involved with the criminal justice system and are often treated unfairly by that system. This mistreatment often results from the unusual vulnerability of individuals with mental retardation and from the failure of many criminal justice professionals to recognize and understand the nature of mental retardation.

WHEREAS, the United States Supreme Court has made clear that in *all* capital cases the judge or jury must consider any mitigating circumstances which would indicate that the death penalty is inappropriate or unjust. Among these mitigating circumstances are any which would tend to reduce the individual offender's personal culpability and moral blameworthiness for the act he or she committed.

WHEREAS, mental retardation is a substantially disabling condition which may affect an individual's ability to appreciate and understand fully the consequences of actions, and which may impair the individual's ability to conform his or her conduct to the requirements of the law. Thus mental retardation should always be considered to be a mitigating circumstance in selecting an appropriate punishment for a serious offense.

WHEREAS, the current system of permitting judges and juries to determine the relevance of mental retardation as a mitigating circumstance on a case-by-case basis has failed to prevent the unjust sentencing of several mentally retarded persons to death.

AND WHEREAS, the competence of individuals with mental retardation to stand trial or enter a guilty plea, and to face execution are always subject to question, raising serious doubts as to the legality of an execution in any particular case.

THEREFORE the AMERICAN ASSOCIATION ON MENTAL RETARDATION resolves that *no person who is mentally retarded should be sentenced to death or executed.*

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Texas capital-sentencing statute is unconstitutional as applied to Penry for failing to require specific instructions regarding balancing of aggravating and mitigating circumstances and for failing to define some of the terms used in the special issues on punishment.
2. Whether it is a violation of the eighth amendment proscription against cruel and unusual punishment to execute a death-sentenced inmate who has limited mental capacity but who (1) was adjudged competent to stand trial, (2) was found to be sane at the time of the offense and (3) is aware of the nature of the sentence and the reasons it was assessed against him.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. <i>Course of Proceedings and Disposition Below</i>	2
B. <i>Statement of Facts</i>	4
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED IN THIS CASE PROVIDED FOR JURY CONSIDERA- TION OF ALL OF PENRY'S RELEVANT MITIGATING EVIDENCE WITHOUT THE NECESSITY OF ADDITIONAL JURY INSTRUCTIONS	16
A. <i>Penry's claim is virtually identical to the one decided adversely to his position in Franklin v. Lynaugh, ___U.S.___, 108 S.Ct. 2320 (1988)</i>	18

1. Penry was able to introduce and argue the significance of all of the mitigating evidence he wished to place before the jury	18
2. Any evidence that would tend to lessen the defendant's culpability for his crime or to show that he could be rehabilitated can be considered within the framework of the Texas punishment issues	19
3. Jurors can readily perceive the relevance of Penry's mitigating evidence to the punishment issues . . .	23
B. <i>Penry's mitigating evidence has no relevance to the eighth amendment's sentencing concerns beyond the scope of the Texas punishment issues</i>	28
1. Neither Penry nor his supporting amici identify any such relevance . . .	28
2. Sympathy should not be constitutionalized as a part of the capital sentencing process	30
3. The Texas system allows jurors to express feelings of sympathy while retaining the rationality of the process for imposing a death sentence	33
C. <i>None of Penry's other requested instructions would have increased the reliability of the result of the sentencing proceeding</i>	35

II. IT IS NEITHER CRUEL NOR UNUSUAL TO EXECUTE A DEATH-SENTENCED INMATE WHO IS OF LIMITED MENTAL CAPACITY BUT WHO WAS ADJUDGED SANE AT THE TIME OF THE OFFENSE AND COMPETENT TO STAND TRIAL AND WHO UNDERSTANDS THE NATURE OF THE PENALTY HE IS TO SUFFER AND THE REASONS HE IS TO SUFFER IT	38
A. <i>There is no national consensus that mentally retarded prisoners should not be executed</i>	40
B. <i>Constitutional and statutory safeguards currently in place adequately protect the interests of mentally retarded inmates such as Penry</i>	42
C. <i>This Court should not relegate administration of the criminal justice system to mental health professionals</i>	44
CONCLUSION	49

TABLE OF AUTHORITIES

Cases	Page
<i>Adams v. Texas</i> , 448 U.S. 38 (1980)	34
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983)	26
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	42
<i>Blocker v. United States</i> , 274 F.2d 572 (D.C. Cir. 1959)	48
<i>Burns v. State</i> , ___S.W.2d___, No. 69,641 (Tex.Crim.App. Oct. 19, 1988)	21
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	30
<i>California v. Brown</i> , ___U.S.___, 107 S.Ct. 837 (1987)	22,30
<i>California v. Ramos</i> , 463 U.S. 992 (1983)	20
<i>Commonwealth v. Elliot</i> , 89 A.2d 782 (Pa. 1952)	49
<i>Daniel M'Naughten's Case</i> , 8 Eng. Rep. 718 (H.L. 1843)	46
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	43
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	18,21,26,30
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	21
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	38,39,43,44,45

<i>Franklin v. Lynaugh</i> , ___U.S.___, 108 S.Ct. 2320 (1988)	<i>passim</i>
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	15,31,33
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	20
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	20
<i>Green v. State</i> , 682 S.W.2d 549 (Tex.Crim.App. 1981), <i>cert. denied</i> , 470 U.S. 1034 (1985)	23
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	20,30,33
<i>Heckert v. State</i> , 612 S.W.2d 549 (Tex.Crim.App. 1981)	23
<i>Hitchcock v. Dugger</i> , ___U.S.___, 107 S.Ct. 1821 (1987)	18,20,21
<i>Jurek v. Texas</i> , 428 U.S. 252 (1976)	30,31,36,37
<i>Lockett v. Ohio</i> , 438 U.S. 598 (1978)	20,21,26,30,33
<i>Lowenfield v. Phelps</i> , ___U.S.___, 108 S.Ct. 546 (1988)	30,31
<i>Meanes v. State</i> , 668 S.W.2d 366 (Tex.Crim.App. 1983), <i>cert. denied</i> , 466 U.S. 945 (1984)	23
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	6
<i>Mills v. Maryland</i> , ___U.S.___, 108 S.Ct. 1860 (1988)	32
<i>Milton v. Procunier</i> , 744 F.2d 1091 (5th Cir. 1984), <i>cert. denied</i> , 471 U.S. 1930 (1985)	36

<i>Pulley v. Harris</i> , 465 U.S. 37 (1984)	36
<i>Rex v. Arnold</i> , 16 How.St.Tr. 695 (1724)	46
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1987)	21
<i>State v. Harris</i> , 53 N.C. (8 Jones) 136 (1860)	48
<i>State v. Johnson</i> , 290 N.W. 159 (Wis. 1940)	47
<i>State v. Pinski</i> , 163 S.W.2d 785 (Mo. 1942)	47
<i>Sumner v. Shuman</i> , ___U.S.___, 107 S.Ct. 2716 (1987)	20,21,26
<i>Thompson v. Oklahoma</i> , ___U.S.___, 108 S.Ct. 2687 (1988)	15,38,39,40,41,42
<i>Tison v. Arizona</i> , ___U.S.___, 107 S.Ct. 1676 (1987)	21
<i>United States v. Hollywood Motor Car Co., Inc.</i> , 458 U.S. 263 (1982)	44
<i>Wartena v. State</i> , 5 N.E. 20 (Ind. 1886)	47
<i>White v. State</i> , 629 S.W.2d 701 (Tex.Crim.App. 1981)	34
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	20,30
Constitutions, Statutes and Rules	
U. S. Const., amend. V	2
U. S. Const., amend. VIII	2

28 U.S.C. § 1254(1)	2
Tex. Code Crim. Proc. Ann. art. 3.01 (Vernon 1974)	35
Tex. Code Crim. Proc. Ann. art. 11.07 § 2 (Vernon Supp. 1988)	3
Tex. Code Crim. Proc. Ann. art. 35.22 (Vernon 1966)	34
Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1986)	<i>passim</i>
Tex. Code Crim. Proc. Ann. art. 4424a (Vernon Supp. 1987)	34
Tex. Penal Code Ann. § 8.01(a) (Vernon 1974)	43
Tex. Penal Code § 12.31(b) (Vernon 1973)	34,35
Other Authorities	
4 W. Blackstone, <i>Commentaries of the Law of England</i> *24	47
2 P. Robinson, <i>Criminal Law Defenses</i> , 314 nn. 2,3 (1984)	47
S. J. Gould, <i>The Measure of Man</i> (1981)	48
Morse, <i>Crazy Behavior, Morals and Science: An Analysis of Mental Health Law</i> , 51 S.Cal.L.Rev. 527, 557 (1978)	48

No. 87-6177

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

JOHNNY PAUL PENRY, *Petitioner,*
v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS, *Respondent.*

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent¹ herein, by and through his attorney, the Attorney General of Texas, and files this Brief.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the district court's denial of habeas relief is included in the Joint Appendix, hereinafter "J.A.," at pages 284-319. *Penry v. Lynaugh*, 832 F.2d

¹For clarity, Respondent is referred to as "the state," and Petitioner as "Penry."

915 (5th Cir. 1987). The unpublished opinion of the district court is included in the Joint Appendix at pages 234-73. *Penry v. Lynaugh* No. L-86-89-CA (E.D. Tex. 1987).

JURISDICTION

Penry has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Penry relies on the fifth and eighth amendments to the Constitution. Also at issue here is the Texas statute which sets out the special issues at the punishment phase of a capital trial. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1986).

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

The state has lawful custody of Penry pursuant to a judgment and sentence of the 258th Judicial District Court of Trinity County, Texas, in Cause No. 6572, styled *The State of Texas v. Johnny Paul Penry*. On November 7, 1979, Penry was indicted for the offense of capital murder of Pamela Carpenter while in the course of committing and attempting to commit the offense of aggravated rape, to which he entered a plea of not guilty (SF XIII 1344).²

²"SF" refers to the statement of facts, with reference made to the volume number typewritten on the bottom of the cover of each volume and page number as reflected in the lower right hand corner of each page. "Tr." refers to the transcript of Penry's state court proceedings.

Penry's pretrial motions were heard on January 11, 1980 (SF III 28-83), including a motion for change of venue which was granted on that date (SF III 84-101). His pretrial motions were continued on February 29, 1980, and a hearing was held on his motion to suppress his confessions (SF IV). Detailed findings of fact and conclusions of law denying the motion to suppress were filed on March 25, 1980 (Tr. 94). An extensive hearing on Penry's challenge to his competency to stand trial was held before a jury on March 10-13, 1980 (SF V-VII), and the jury found him competent (SF VII 944-45).

Trial began on March 24, 1980, and on April 1, 1980, the jury found Penry guilty of the capital offense (Tr. 111; SF 2533). On April 1, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1987) (J.A. 231-33; Tr. 118-119; SF XVII 2698-2703).

Penry appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed on January 9, 1985. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985) (en banc). Rehearing was denied on May 2, 1985. Certiorari was denied on January 13, 1986. *Penry v. Texas*, ___ U.S. ___, 106 S.Ct. 834 (1986).

Penry was formally sentenced to be executed before sunrise on May 7, 1986. He filed a state habeas application pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 § 2 (Vernon Supp. 1988) on April 10, 1986. The state convicting court recommended denial on April 25, 1986. The Texas Court of Criminal Appeals denied the application and motion for stay of execution on May 5, 1986. *Ex parte Penry*, Application No. 15918-01.

On May 5, 1986, Penry filed an application for writ of habeas corpus and a motion for stay of execution in the United States District Court for the Eastern District of Texas, Lufkin Division. *Penry v. McCotter*, No. L-86-89-CA. The district court entered a stay of execution on May 6, 1986. An order denying all habeas relief was entered on April 28, 1987, and the stay of execution was vacated. The district court granted Penry's request for certificate of probable cause to appeal, and on November 25, 1987, the Court of Appeals for the Fifth Circuit affirmed. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987). Rehearing and rehearing en banc were denied on December 23, 1987.

B. Statement of Facts

Johnny Paul Penry was hired by Harold Stubblefield to deliver a freezer to the home of the deceased, Pamela Carpenter. Penry assisted with the delivery on October 9, 1979 (SF XIII 1351-65, 1377).

On October 25, 1979, between 9:00-9:30 a.m., the deceased spoke with her mother, Mrs. Rossie Moseley (SF XIII 1384). At about 10:00 a.m. she phoned a friend, Cindy Peters, and said, "This is Pam. I've been stabbed and raped. Mother's at the church. Help me and hurry." (SF XIII 1391-92, 1397-99, 1407). Peters went immediately to the deceased's residence and observed the deceased on her bed, covered with blood and moaning for help (SF XIII 1393, 1399-403). An ambulance was immediately called (SF XIII 1428-30).

Officer E. G. Page of the Livingston Police Department arrived on the scene at 10:26 a.m. (SF IV 255; XIII 1441), and spoke to the deceased (SF IV 253-54; XIII 1443), who told him her attacker was a white male, about twenty years old, short, thin with short, dark curly hair, and was wearing a plaid shirt, "possible flowers" and blue jeans (SF XIII 1446, 1449-

50). The emergency technicians arrived soon thereafter to discover the deceased in a state of shock and bleeding (SF XIII 1481-85, XIV 1822).

The deceased received extensive emergency treatment in the hospital (SF XIII 1502-18). During the first hour, she was conscious and talking (SF XIII 1513-15, 1558). She stated that she had been stabbed with scissors and raped by a short, thin, white male with black hair. She stated that she had seen him before but did not know his name³ (SF XIII 1524-26, 1558). The deceased's condition deteriorated and she died at approximately noon during the emergency treatment. The cause of death was massive hemorrhage and the chest injury (SF XV 2081), which was consistent with having been stabbed with a pair of scissors (SF XIII 1519-20, 1563; XV 2077-79, 2094). The deceased also had a large bruise on her left side of her eye consistent with having been struck by a fist, multiple bruises on her legs, a bruise on her throat consistent with hand strangulation, a bruise on the left rib cage about the size of a man's shoe heel, and a defensive wound on her hand (SF XIII 1506, 1557; XV 2063-81). Semen was observed on the genital area during the emergency treatment (SF XIII 1563-64); the deceased had extensive urinary tract hemorrhaging, however, and no semen was found during the autopsy (SF XV 2082).

Deputy Sheriffs Billy Ray Nelson and Bob Grissom received a description of the assailant over the patrol car radio at approximately 11:00 a.m. (SF IV 136-37, 159-62, 173; XIV 1568-69, 1639-40). Nelson was familiar with Penry, who fit the dispatched description and had recently been released from the

³Her description given to Dr. McLendon was not admitted before the jury (SF XIII 1533).

Texas Department of Corrections for rape (SF IV 138; XIV 1569). They proceeded to Penry's father's home, spoke with Penry and inquired of his whereabouts. Penry responded that he had been home about an hour (SF XIV 1570, 1639, 1641). The officers informed him that a woman had been cut or stabbed and raped (SF IV 139-40; XIV 1572). Penry denied any knowledge (SF XIV 1570-72), but he agreed to accompany the officers to the police station (SF IV 140; XIV 1573-75, 1594-95, 1643, 1656-57).

Within moments after their arrival, Ted Everitt, an investigator for the district attorney's office, advised Penry of his *Miranda*⁴ rights off the standard police-issued card (SF IV 142, 145-47; XIV 1579, 1589, 1669-75). Penry did not request a lawyer (SF XIV 1589). At this time Officer Grissom noticed blood on the upper back shoulder of Penry's shirt and asked him about it. Penry responded that he had fallen on a stick while riding his bicycle earlier that morning. Because there was no tear in the shirt he was wearing, the officers asked him to show them the shirt he was wearing when the accident occurred. Penry responded that he'd be glad to and informed them the shirt was at his house (SF IV 142-44; XIV 1579-81, 1645-46, 1676-77). *Miranda* rights were again read in connection with Penry's signing a consent to search form at 12:10 p.m. (SF IV 144-47; XIV 1581-83, 1601-03, 1646, 1677-86; XVIII St.Ex. 7; XX St.Ex. 18).

The officers and Penry returned to the house and retrieved the shirt (SF IV 148-49; XIV 1604, 1646, 1686-88). Penry was then asked if he would accompany them to the crime scene and he agreed (SF IV 150; XIV 1604-05, 1648, 1689-90). Penry said, "I'll go with you, just don't try to pin anything on me I didn't do"

⁴*Miranda v. Arizona*, 384 U.S. 436 (1966).

(SF XIV 1648, 1690). The officer responded he wouldn't do that. At the deceased's house, Penry remained in the car unrestrained. After about thirty to forty minutes, Penry initiated a conversation by stating, "I want to tell you about it" (SF IV 151-52; XIV 1608-10, 1618). Officer Nelson testified, "I told him to just to be quiet. I didn't want to hear it. I told him to just shut up." Penry responded, "No, I want to get it off my conscience. I done it, and I want to get it off my conscience" (SF IV 151-52, 154; XIV 1618). Penry was placed under arrest (SF XIV 1625) and Officer Grissom then re-read Penry his *Miranda* rights (SF IV 153-54; XIV 1619-20, 1651-53). Penry then reiterated his desire to tell the truth (SF IV 154). Penry was taken into the house, where he described the crime, pointed out the scissors used to stab the deceased, and identified his pocket knife⁵ (SF IV 154-55, 181-82; XIV 1620, 1723-24). He then was searched and returned to the station (SF IV 181-82; XIV 1622, 1717-18), where he again was advised several times of his right and subsequently signed a written confession (SF IV 189-93, 214-15; XIV 1835-36, 1850-53; XV 1872-93, 1979).⁶

On October 26, 1979, Penry agreed to give hair samples, was again administered *Miranda* warnings, and signed a consent to search form (SF IV 195-96). On that date, Texas Ranger Maurice Cook again read and explained to Penry his *Miranda* warnings (SF IV 223-25; XV 1865, 1874-77, 1988-91). Penry gave a second verbal confession, which was reduced to writing and read to him in its entirety, including the warnings. An addition was made by Penry, and the statement

⁵The officer's description of Penry's actions at the crime scene was not admitted before the jury (SF XIV 1742).

⁶This statement as it was presented to the jury appears in Vol. XV 1895-1902.

was witnessed and signed (SF IV 227-32, 240-44; XV 1866, 1877-78, 1992-99, 2043-47, 2050-53).⁷

Prior to trial Penry filed notice of his intention to raise the defense of insanity at the time of the offense (J.A. 2), a motion for a pretrial competency hearing (J.A. 5), and a motion for appointment of a psychiatrist to examine him with regard to both issues (J.A. 7). The court granted the motion for a psychiatrist (J.A.) and conducted a separate jury trial on the issue of competency (SF V-VII).

At the competency hearing, Dr. Jerome Brown, a clinical psychologist, testified on behalf of Penry. He testified that Penry was retarded, with the mental age of a six-and-one-half-year-old and the social maturity of a nine to ten-year-old (J.A. 41), but that he "does a pretty good job talking" and "is able to converse fairly well" (J.A. 42). On cross-examination, Dr. Brown reviewed the records of Penry's previous commitments to mental institutions, which indicated that Penry's EEGs were within normal limits (J.A. 53), that he had been diagnosed as "border line retarded" (J.A. 57) and that while institutionalized he had persisted in a pattern of aggressive anti-social behavior which included setting fires (J.A. 58-59), attacking other patients (J.A. 58-59) and sexually attacking younger boys (J.A. 54, 59). In Dr. Brown's opinion, Penry is "very obnoxious" (J.A. 55) and egocentric:

Q He doesn't really care about his fellow man or anybody around him. He's interested in Number One. Would that be fair to say that?

⁷This second statement appears in evidence at the guilt phase with reference to extraneous offenses removed (SF XV 1999, 2022-31).

A I think it is fair. He just doesn't have the ability to understand other people in that way and understand the world in that way. He's focused on himself pretty much from one moment to the next.

(J.A. 56). Dr. Brown also opined that other patients' attacks on Penry could be due to his sexual harassment of them (J.A. 54-55). The jury found Penry competent (SF VII 944-45).

At the guilt-innocence phase of the trial on the merits, a psychiatrist, Dr. Jose Garcia, testified for Penry. He reiterated Dr. Brown's diagnosis of organic brain damage and moderate mental retardation, which, in his opinion, led him to believe Penry was insane at the time of the offense (J.A. 86-87).

The state introduced the testimony of two psychiatrists to rebut the testimony of Dr. Garcia. Dr. Kenneth Vogtsberger testified that in his opinion Penry was not suffering from any mental illness or mental defect at the time of the offense and that he was not legally insane (J.A. 144-45). As for Penry's mental retardation, Dr. Vogtsberger testified that "I certainly agree that he tests out on the IQ test as having below average intelligence, but I felt that overall his alertness and understanding of what goes on with himself and with, you know, the social environment that he would not be diagnosed or fit into a category of being globally mentally retarded." (J.A. 146). Dr. Vogtsberger further testified "he [Penry] wasn't given all the opportunities to learn and benefit from educational experiences that might have allowed him to test out at a higher IQ, and I agreed with the opinion that under a more stimulating environment his IQ might be significantly higher." (J.A. 148). Dr. Vogtsberger diagnosed Penry as having characteristics consistent with an anti-social personality (J.A. 150).

Dr. Felix Peebles then testified for the state. He also diagnosed Penry as being sane (J.A. 170) but having "a full-blown anti-social personality" (J.A. 171), a diagnosis which he believed to be supported by Penry's medical history:

A Well, back early in life, the history listed that he had temper tantrums, setting fires. He got quite a bit of excitement out of setting fires. He exhibited cruelty to animals, cruelty to his peers, and had much difficulty in generally with all of his interpersonal relationships.

Q Would this be consistent with the ultimate development of an anti-social personality?

A Yes.

(J.A. 179).

Dr. Garcia then testified in rebuttal at the guilt-innocence phase of trial (J.A. 180 *et seq.*).

Following the jury's verdict of guilt, the punishment phase of trial was held; both Dr. Peebles and Dr. Vogtsberger were called by the state. Dr. Peebles testified that Penry was dangerous, constituted a threat to society and would continue to do so (J.A. 200). Dr. Vogtsberger testified that there was "a high probability" that Penry would commit criminal acts of violence that would constitute a continuing threat to society (J.A. 208).⁸

⁸The doctors' testimony was tailored to the second statutory special issue submitted to the jury on punishment. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1986) (J.A. 27).

After the prosecutor's opening argument on punishment, both of Penry's attorneys argued on his behalf. First, Mr. Wright made a plea for mercy in which he argued that the state, in requesting the death penalty, was attempting "to strip from you the thin veneer of civilization and return you to savagery." (J.A. 218) whereas "[o]ur appeal is to your intellect and to your sense of Christian love." (J.A. 219). Wright then argued that the death penalty is not a deterrent (J.A. 219-220) and referred to various Christian sects which oppose it (J.A. 220). Counsel concluded his argument by focusing directly on Penry's mental condition and its relevance to the punishment issues, particularly the first question:

I think that it probably goes without saying that a more intelligent criminal is one who is more likely to evade capture and evade prosecution, and even evade the death penalty. But isn't a person of greater intelligence more culpable and not less. Now, is that fair or is that right? Mr. Keeshan spoke with you about deliberateness in the first special issue. He seemed to equate it with intentional, and you've already decided about intentional. That word then must mean more than merely intentional. Y'all are all familiar, for example, with the Elmer Wayne Hendley case down in Houston, a mass murder case that took place over a long period of time. Deliberate. You're also familiar say with the Ignacio Cuevas case that took place down in Huntsville, or the facts did. Where a group of convicts got together and planned a breakout and killed some folks breaking out. Deliberateness. We've heard about the news of this Gacy case up in Chicago or

near Chicago, where he supposedly killed all these young boys over a long period of time. That's deliberateness. That's the kind of case where possibly the death penalty was intended by our State laws. I think also there's been a lot of evidence here about Johnny Paul Penry's mental condition and mental state. Certainly you have to believe that his mental state was not healthy. He's mentally ill. Certainly you know that his environment played a part in this. Think about each of those special issues and see if you don't find that we're inquiring into the mental state of the defendant in each and every one of them.

(J.A. 220-21).

Penry's other trial attorney, Mr. Newman, continued in the same vein, emphasizing Penry's deprived childhood and mental deficiencies and how they bore on the first punishment issue:

Is there any pride to taking the life of any person, much less a person which the evidence has shown here was an afflicted child at the age of nine. The records reflect that this boy had an afflicted mind at the age of nine and we can't get around that. The records reflect that later on when he went to school up there for three years and he was taken out by his parents who apparently--or something must be wrong with them to have taken him away from a place that there might have been some control, some possibility at least, where he could be cared for instead of bringing him back into the environment where his mental condition would be worsened by the

treatment that he no doubt received. And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience.

(J.A. 222).

I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer. You heard the evidence on the original guilt or innocence, and here they brought to you this packet from the prison. They brought you this record from the Polk County Court House. Here, this defendant was charged with aggravated rape, and instead of convicting him of aggravated rape, and even then, there must have been some doubt as to the mentality of this boy at that time. Why? They had one of their main witnesses here, Dr. Peebles, who's like a rubber stamp, who probably could not make a living out in the private practice of medicine, come in and say, he is of sound mind. I would be willing to bet that unless, he is a gibbering idiot that he's like some of those psychiatrists who they have in Harris County who come in to look at them and then get on the witness stand and say that this man is of sound mind. But now, he comes in here and he predicts that this boy in all reasonable probability will continue to get into trouble. That may

be true. But, a boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of you juror's minds that there is something definitely wrong, basically, with this boy. And I think there is not a single one of you that doesn't believe that this boy had brain damage as they found it at the University of Texas, when they ran those tests and formed those conclusions.

(J.A. 223-34).

SUMMARY OF ARGUMENT

The Texas capital-sentencing statute suffers from no constitutional infirmity, either on its face or as applied to Penry. The statute allows for the admission of any relevant evidence in mitigation of punishment and in no way circumscribes the jury's consideration of such evidence during its deliberations on the statutory special issues. No additional instructions are necessary to channel the jury's consideration of such evidence, and Penry has wholly failed to demonstrate how his requested instructions would have aided the jury or produced a more reliable sentencing determination. Similarly, Penry has not shown that the mitigating evidence he offered has any relevance outside the scope of the statutory special issues.

Here, defense counsel was able to argue to the jury that the evidence offered by Penry was of such a nature that it militated in favor of negative answers to the special punishment issues. The only other conceivable significance of the evidence was that it might influence the jury to dispense mercy regardless of its views on how the punishment issues should be

answered. To hold that capital defendants have a constitutional entitlement to mercy would effectively reintroduce to capital sentencing procedures the very arbitrariness which the Court denounced in *Furman v. Georgia*, 408 U.S. 238 (1972).

There is no need for the trial court to define the terms used in the Texas punishment issues. The words have obvious common-sense meanings which jurors can readily understand without additional definitions. Moreover, inasmuch as defense counsel are free during argument to define the terms in a way which is favorable to the defendant, the absence of instructions by the court actually may inure to defendants' benefit.

There is no merit to Penry's assertion that the eighth amendment bars the execution of mentally retarded prisoners under sentence of death. First, there is no national consensus to support such a proposition, in contrast to what the Court found in *Thompson v. Oklahoma*, ___ U.S. ___, 108 S. Ct. 2687 (1988). Second, the safeguards already in place in the criminal justice system adequately address the mental state of subnormal defendants such as Penry. Finally, to accept Penry's argument would effectively relegate to mental health professionals an area of concern that has long been exclusively the province of the judiciary.

ARGUMENT

I.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED IN THIS CASE PROVIDED FOR JURY CONSIDERA- TION OF ALL OF PENRY'S RELE- VANT MITIGATING EVIDENCE WITH- OUT THE NECESSITY OF ADDI- TIONAL JURY INSTRUCTIONS.

After both sides had rested at the punishment phase of Penry's trial, the court submitted three special issues to the jury in accordance with Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1986).⁹ In addition to receiving the special issues, the jury was instructed by the court on such things as the burden of

⁹The special issues were:

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(J.A. 27-28).

proof and the procedure to be followed in answering the issues (J.A. 25-7). The court instructed the jury on its consideration of the evidence as follows:

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

(J.A. 26).

Penry made a series of objections to the court's proposed jury charge, all of which were overruled (J.A. 210-13). Penry now contends that the court's dismissal of five of his objections violated his rights under the eighth and fourteenth amendments. Specifically, he asserts that the trial court should have granted his requests that the charge define the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society." In addition, he asserts that the court should have instructed the jury that the state was required to prove beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, and that, if the jury felt that Penry did not deserve a death sentence, even though it was convinced beyond a reasonable doubt that the punishment issues should be answered affirmatively, it could return a "no" answer. Finally, even though the court instructed the jury to consider all of the evidence, Penry contends the charge should

have included the words "whether aggravating or mitigating in nature."

A. Penry's claim is virtually identical to the one decided adversely to his position in *Franklin v. Lynaugh*. ___U.S.___, 108 S.Ct. 2320 (1988).

- 1. Penry was able to introduce and argue the significance of all of the mitigating evidence he wished to place before the jury.**

During both the guilt-innocence and punishment phases of the trial, Penry introduced evidence of his mental impairment and of the abusive treatment he received as a child. Penry contends that without the requested instructions, the jury was unable, under the Texas capital punishment scheme, to give the constitutionally required consideration to this mitigating evidence. See *Hitchcock v. Dugger*, ___U.S.___, 107 S.Ct. 1821 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

In response to a challenge similar to the one posed by Penry, a four-justice plurality of the Court in *Franklin v. Lynaugh*, ___U.S.___, 108 S.Ct. 2320 (1988), held that Franklin was not circumscribed in his ability during the punishment phase of his trial to present and argue mitigating evidence of his good behavior while incarcerated and "residual doubt" regarding his guilt, although the plurality expressed considerable reservation whether such "residual doubt" was constitutionally required to be considered by a sentencing authority. Moreover, the plurality held that the two special issues submitted to Franklin's jury did not limit its consideration of such mitigating evidence. *Id.* at ___, 108 S.Ct. at 2326-30. In particular, the plurality noted that the aspects of Franklin's evidence

that might arguably have given rise to "residual doubts" were relevant to and could be fully considered by the jury in answering the first special issue. *Id.* at ___, 108 S.Ct. at 2328. Likewise, the jury was "free to weigh and evaluate [Franklin's] disciplinary record" in prison as a mitigating factor in resolving the second special issue. *Id.* at ___, 108 S.Ct. at 2329.

The same is true in Penry's case. Like Franklin, Penry does not argue that the structure of the Texas capital punishment statute in any way precluded him from introducing relevant mitigating evidence of his character or background. Indeed, the record reflects that he introduced extensive evidence, from both expert and lay witnesses, about his mental deficiencies and about the mistreatment he received as a child (J.A. 78-137). He does not contend that there was any additional relevant evidence he was unable to introduce. Rather, like Franklin, Penry argues that his mitigating evidence was not self-evidently relevant to the special issues and that, without his proposed instructions, the jury might have been unable to consider the evidence in reaching its punishment decision. His argument has no more merit than did Franklin's.

- 2. Any evidence that would tend to lessen the defendant's culpability for his crime or to show that he could be rehabilitated can be considered within the framework of the Texas punishment issues.**

For the most part, the Court has restricted its examination of the states' capital-sentencing statutes to the procedure by which a death sentence is imposed and has left the states free to determine what substantive factors are sufficiently important to be considered by the sentencing authority. As Justice O'Connor noted

in *California v. Ramos*, 463 U.S. 992, 999-1000 (1983): "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision*," quoting *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (emphasis added in *Ramos*). Some limitations on the states' power in this area do exist, however. Thus, excessively vague standards for imposing the death penalty are violative of the eighth amendment, *Godfrey v. Georgia*, 446 U.S. 420 (1980), as are statutes requiring mandatory death sentences. *Sumner v. Shuman*, ___ U.S. ___, 107 S.Ct. 2716 (1987); *Woodson v. North Carolina*, 428 U.S. 280 (1976). In addition, the states cannot impose a death sentence on the basis of evidence that the defendant was not allowed to explain or deny. *Gardner v. Florida*, 430 U.S. 349 (1977). Finally, the states cannot preclude the defendant from introducing, or the sentencing authority from considering, relevant mitigating evidence offered in support of a sentence less than death. *Hitchcock*, ___ U.S. at ___, 107 S.Ct. at 1824; *Lockett v. Ohio*, 438 U.S. 598, 604 (1978). Penry alleges that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence, unless the jury is specifically instructed to take the evidence into account.

The cases in which the Court has been concerned with the introduction and consideration of a defendant's mitigating evidence have consistently referred to "relevant mitigating evidence." *Hitchcock*, ___ U.S. at ___, 107 S.Ct. at 1824; *Eddings*, 455 U.S. at 114; *Lockett*, 438 U.S. at 604; see also *Franklin*, ___ U.S. at ___, 108 S.Ct. at 2333 (O'Connor, J., concurring) (noting that *Eddings* holds "that the sentencer must consider 'any relevant mitigating evidence'" (emphasis added in *Franklin*). Although never expressly defined,

"relevant mitigating evidence" has been held to refer to "any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 455 U.S. at 114; *Lockett*, 438 U.S. at 604.¹⁰ In those instances in which the Court has held that specific kinds of evidence were relevant and mitigating, the evidence has had some bearing on the defendant's personal responsibility and moral guilt for his crime, or on those aspects of his character that are indicative whether he will be a future danger.¹¹

Put another way, the Court has never held that any evidence is mitigating standing by itself, in isolation from the manner in which it relates to society's relevant sentencing considerations. Thus, for example, a defendant's history of drug abuse would not necessarily be mitigating evidence unless it were

¹⁰The Texas Court of Criminal Appeals has consistently held that a capital defendant must be allowed to present any relevant mitigating evidence. That court does not hesitate to reverse convictions in cases where such evidence was excluded. See *Burns v. State*, ___ S.W.2d ___, No. 69,641 (Tex. Crim. App. Oct. 19, 1988), attached hereto as Appendix A.

¹¹Such evidence includes the defendant's prior record, *Shuman*, ___ U.S. ___, 107 S. Ct. 2716, 2725-26 (1987); *Lockett*, 438 U.S. at 598; youth, *Shuman*, ___ U.S. at ___, 107 S. Ct. at 2726; *Eddings*, 455 U.S. at 116; *Lockett*, 438 U.S. at 598; lack of specific intent, *Tison v. Arizona*, ___ U.S. ___, 107 S. Ct. 1676 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Lockett*, 438 U.S. at 598; relatively minor role in the crime, *Shuman*, ___ U.S. at ___, 107 S. Ct. at 2726; *Lockett*, 438 U.S. at 598; difficult family history, *Hitchcock*, ___ U.S. at ___, 107 S. Ct. at 1824; *Eddings*, 455 U.S. at 116; emotional disturbance, *Hitchcock*, ___ U.S. at ___, 107 S. Ct. at 1824; *Shuman*, ___ U.S. at ___, 107 S. Ct. at 2725; *Eddings*, 455 U.S. at 116; adjustment to prison, *Franklin*, ___ U.S. at ___, 108 S. Ct. at 2329; *Skipper v. South Carolina*, 476 U.S. 1, 4 (1987); and the influence of alcohol and drugs, *Shuman*, ___ U.S. at ___, 107 S. Ct. at 2725.

shown that he was under the influence of drugs at the time of the offense, or was so dependent on drugs that his judgment was distorted, both of which could reduce his moral culpability for the crime, or unless it were shown that with treatment the drug habit could be eliminated and the defendant would no longer "need" to engage in crime to support his drug habit, which would relate to his future dangerousness. In each of these instances, the evidence could be considered mitigating because there would be a direct relationship between the defendant's drug problem and his crime or his prospects for rehabilitation. Without evidence of this kind of nexus, however, the mere fact that a defendant was an abuser of drugs would have no mitigating value. Or, as Justice O'Connor expressed it:

[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant.

California v. Brown, ___ U.S. at ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring) (emphasis added).¹²

¹²More positive aspects of a defendant's character—for example, lack of a history of violent behavior, repeated acts of kindness, or some creative talent—can be introduced to demonstrate that the defendant would not be a danger in the future, and can be considered by the jury in answering the Texas special punishment issues. Like the negative aspects of a defendant's character discussed by Justice O'Connor in *California v. Brown*, this evidence has no mitigating value beyond its relevance to the statutory punishment considerations.

3. Jurors can readily perceive the relevance of Penry's mitigating evidence to the punishment issues.

The Texas punishment issues focus the jury's attention on precisely those aspects of the individual defendant and his crime to which Justice O'Connor adverted, and no additional instructions are necessary to allow for jury consideration of any mitigating evidence. The first special issue asks the jury to determine whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1) (Vernon Supp. 1988). This inquiry involves more than reconsidering whether the defendant acted with the requisite criminal intent to be guilty of the offense, *Heckert v. State*, 612 S.W.2d 549 (Tex.Crim.App. 1981), and addresses this Court's concern for individualized sentencing in that it directs the jury's attention to his personal responsibility and capacity for moral action. See *Green v. State*, 682 S.W.2d 549 (Tex.Crim.App. 1981), cert. denied, 470 U.S. 1034 (1985); *Meanes v. State*, 668 S.W.2d 366 (Tex.Crim.App. 1983), cert. denied, 466 U.S. 945 (1984).

In Penry's case, evidence of his mental retardation clearly was relevant to this first issue. His expert witness testified that, due to his mental condition, he lacked normal impulse control and, consequently, acted without the kind of thought and reflection expected of people of normal intelligence (J.A. 78 *et seq.*). The jury was free to consider whether Penry's mental retardation rendered him incapable of acting deliberately. Further, defense counsel in his final argument at the punishment phase offered the jury examples of murders that could be considered

deliberate--murders carried out over a long period of time with sufficient opportunity for the perpetrators to reflect on their actions and their consequences, and murders involving torture of the victims--and argued that Penry's mental condition prevented him from acting with the same kind of culpability (J.A. 220-21). The relevance of Penry's evidence to the first special issue is manifestly apparent, and the jury was free to consider it and to give it appropriate weight in its deliberations.

Evidence of Penry's abusive childhood also was relevant to whether his conduct was deliberate. Testimony at trial reflects that Penry's mother beat him on the head with a belt with a large metal buckle. Penry's sister also testified that their parents used to lock Penry in his room for hours without attention or supervision. To the extent that the jurors believed that Penry's crime was attributable to those experiences, they were able to consider and weigh them in assessing his personal responsibility as expressed in the first special issue, *i.e.*, his capacity to act deliberately. *Cf. Eddings*, 455 U.S. at 108 n.2 (defendant offered expert testimony at trial to effect that at the time he shot and killed policeman, he was in his own mind shooting his abusive stepfather, who also was a policeman).

Similarly, the second special issue asks whether there is a probability that the defendant would commit future acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. Ann. art. 37.071(b)(2) (Vernon Supp. 1988). Penry was free to introduce evidence that his crime was attributable to the abusive treatment he received as a child, but that his behavior could be controlled in a restricted environment such as prison. Such evidence would be highly relevant to the question whether a defendant would be a future danger to society, and the

jury can readily understand its significance during the punishment deliberations.

Finally, the third special issue inquires into whether the defendant's act in causing the death of the deceased was unreasonable in response to the victim's provocation, if any. Tex. Code Crim. Proc. Ann. art. 37.071(b)(3) (Vernon Supp. 1988).¹³ Evidence of retardation, diminished mental or emotional development, or severe abuse as a child is relevant to this issue, in that actions inappropriate for a person not so afflicted could be reasonable for a person of reduced capacity. The jury could readily appreciate the relevance of Penry's evidence as it related to this special issue and give weight to it in reaching its decision.¹⁴

Moreover, Penry's jury was instructed to consider all of the evidence that had been introduced in both phases of the trial (J.A. 26). The instruction Penry requested differed from that given by the court only in that it defined all of the evidence with the phrase "whether aggravating or mitigating in nature" (J.A. 212). He has made no attempt to demonstrate how his instruction provided the jury with any further guidance than that contained in the court's charge and in the special issues themselves. As was the case with the somewhat more detailed proposed instructions in *Franklin*, the denial of the requested instruction here did not restrict the jury in its consideration of his

¹³By statute, the first two special issues are submitted to the jury at the penalty phase of every capital murder trial in Texas. The third issue is submitted only if raised by the evidence. The third issue was submitted at Penry's trial.

¹⁴During final argument, counsel stressed to the jury that each of the special issues was "inquiring into the mental state of the defendant" (J.A. 221).

mitigating evidence. See *Franklin*, ___ U.S. at ___, 108 S.Ct. at 2328.

The fact that the jury was not persuaded by Penry's evidence indicates only that it ascribed less weight to the evidence than he does, not that the evidence was excluded from consideration.¹⁵ Penry is simply dissatisfied because, although he was able to present all of the relevant mitigating evidence he had available and the jury was able to consider it, the jury did not find the evidence sufficient to justify answering any of the special issues negatively. Because the evidence did not have the decisive effect on the jury that it has on himself, Penry contends that the evidence could not have been fully considered because of the structure of the statute. The Court has recognized, however, that it is the sentencer's function to determine the weight that should be given to the evidence before it. *Eddings*, 455 U.S. at 114-15 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence."); *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence). The fact that a capital murder defendant disagrees with the conclusion reached by the jury does not mean that the jury was precluded from considering, or failed to consider, all of the evidence he introduced.

¹⁵Penry, like Franklin, does not appear to quarrel with Texas' third special issue on punishment, whether, if raised by the evidence, the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Proc. Ann. art. 37.071(b)(3) (Vernon Supp. 1988). This issue clearly allows a defendant, at the very least, to present mitigating evidence that he "reasonably believed provided a moral justification for his conduct." *Sumner v. Shuman*, ___ U.S. at ___, 107 S.Ct. at 2725.

The Constitution does not require that evidence introduced in a capital-sentencing hearing be exclusively mitigating or aggravating. That both the state and the defendant might be able to use the same evidence to support opposing contentions does not offend the Constitution, as long as the jury is not precluded from considering the mitigating aspects of the evidence. Evidence relating to punishment is circumstantial, and like any circumstantial evidence, it is susceptible of more than one interpretation. It is for the sentencer to determine what weight each aspect of the evidence receives. Penry has failed to identify any relevant mitigating evidence that the jury is precluded from considering under the Texas statute.

Penry's argument appears to be that the defendant must be given the exclusive right to determine what evidence is mitigating and what is aggravating; once he designates certain evidence as mitigating, the state would be precluded from rebutting it. This Court has never devised a rule that removes the adversary process from any aspect of a capital murder trial, nor should it. Factors such as cross-examination, the state's bearing the burden of proof beyond a reasonable doubt, and the weighing of evidence by a jury drawn from a fair cross-section of the community are fundamental components of the system that has been shown to be the greatest truth-finding process known to man. Removing adversarial testing of evidence from the penalty phase of a capital murder trial can hardly promote the rational and even-handed imposition of the death penalty, nor would it ensure the enhanced reliability of such sentencing determinations.

B. Penry's mitigating evidence has no relevance to the eighth amendment's sentencing concerns beyond the scope of the Texas punishment issues.

1. Neither Penry nor his supporting amici identify any such relevance.

Concurring in the judgment in *Franklin*, Justice O'Connor, joined by Justice Blackmun, agreed that Franklin's mitigating evidence of his good behavior while incarcerated was adequately addressed by the second special issue because such evidence was relevant only to the aspect of his character relating to his potential for future violence. The concurrence disagreed, however, with the plurality's suggestion that the states may fashion their sentencing procedures and thereby channel the jurors' consideration of mitigating evidence, and instead suggested that if mitigating evidence were offered that was not relevant to the special issues or had relevance beyond the scope of the issues, then the Court would have to determine whether such a limitation violated the Eighth Amendment. *Franklin v. Lynaugh*, ___ U.S. at ___, 108 S.Ct. at 2332-35 (O'Connor, joined by Blackmun, J., concurring). Penry himself, as well as *amicus* Billy Conn Gardner ("Gardner"), acknowledge that Penry's mitigating evidence was relevant to the Texas special issues and could be considered by the jury, without an additional instruction, during its punishment deliberations. They contend, however, that evidence of his retardation and mistreatment as a child had relevance beyond the scope of the issues and that, without an

instruction directing the jury's attention to the mitigating evidence, it could not be fully considered.¹⁶

Despite the assertions of Penry and the *amici*, they make no attempt whatsoever to explain how the mitigating evidence he offered has any relevance to valid sentencing considerations beyond the scope of his personal culpability addressed by the first special issue. In *Franklin*, the petitioner likewise argued that evidence of his adjustment to prison life demonstrated aspects of his character that were relevant to the sentencing consideration beyond the scope of the special issues. The Court held that his evidence reflected only on his probable future dangerousness and, thus, was encompassed by the second issue. *Franklin*, ___ U.S. at ___, 108 S.Ct. at 2329. Franklin at least gave examples how his evidence might have been relevant beyond the scope of the issues. Penry makes no such effort. The only suggestion as to any additional relevance of this evidence is the statement in the brief of the Texas Association that mental disease and childhood deprivation "might be mitigating in that they may lead the jury to exercise mercy." (Brief for Texas Association at 15). Assuming Penry's argument is that his evidence is relevant because of its capacity to evoke feelings of sympathy in the jury and that the Texas statute does not allow jurors to express such feelings, his argument is flawed in two respects.

¹⁶*Amici* Harris County Criminal Lawyers Association ("Harris Association") and Texas Criminal Defense Lawyers Association ("Texas Association") assert that Penry's evidence was irrelevant to the Texas special issues but argue that it had relevance beyond the scope of the issues and could not be fully considered by the jury without an instruction from the court.

2. Sympathy should not be constitutionalized as a part of the capital sentencing process.

Penry's contention fails in the first instance because there is no constitutional requirement that the sentencing authority be able to express feelings of sympathy in its sentencing decision. The Court has recognized that the occasional granting of mercy to a defendant does not violate the Constitution. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). The Court also has approved the Texas statute while noting that the death penalty is mandatory if the jury affirmatively answers all of the special issues. *Jurek v. Texas*, 428 U.S. 252, 278 (1976) (White, J., concurring); see also *Lowenfield v. Phelps*, ___ U.S. ___, ___, 108 S.Ct. 546, 554 (1988). Further, in *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 840, the Court expressly held that there is no constitutional violation in instructing the jury that it is not to be swayed by mere sentiment or sympathy in making its capital-sentencing decision. Such factors should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *Brown*, ___ U.S. at ___, 107 S.Ct. at 840.

There are sound reasons why capital murder defendants should have no constitutional entitlement to mercy. Above all else, the eighth amendment is concerned with the reliability of the sentencing decision in capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *Eddings*, 455 U.S. at 874; *Lockett*, 438 U.S. at 625; *Woodson*, 428 U.S. at 305. To introduce sympathy as a constitutionally required element of the capital sentencing process would remove all rationality from the procedure and allow juries to base their verdicts on emotion, and even prejudice, rather than on the evidence. Such a result would effectively constitute

a return to the arbitrary and capricious imposition of the death penalty denounced in *Furman v. Georgia*, 408 U.S. 238 (1972). Because juries at that time were given no guidance in making their sentencing decisions, the *Furman* Court found that the death penalty was being imposed in a wanton and freakish manner. *Id.* at 310 (Stewart, J., concurring).

Texas' response to *Furman* was to craft a statute that channels the jury's sentencing discretion by requiring it to answer questions about the defendant's personal responsibility and moral guilt for his crime, and about the likelihood that he would be a threat to society in the future. The statute imposes on the state the burden of proving beyond a reasonable doubt two, and sometimes three, additional aggravating factors beyond what is required by the Constitution. *Jurek v. Texas*, 428 U.S. at 273-74; see *Lowenfield*, 484 U.S. at ___, 108 S.Ct. at 555.¹⁷ The defendant is able to introduce whatever evidence in mitigation he wishes to put before the jury. As has been demonstrated above, any conceivable mitigating evidence is relevant to at least one of the special issues, and counsel is free to argue to the jury how the evidence supports a sentence less than death. The state is required to persuade each of the twelve jurors, beyond a reasonable doubt, that each of the special issues must be answered affirmatively, and the defendant has the minimal burden of raising a reasonable doubt in the mind of only one juror with respect to only one of the issues in order to receive a sentence of life imprisonment. Put another way, even if the jurors' votes on the three special issues stand 35-1 in favor of the state, the

¹⁷Penry's assertion that "[t]he first two special issues are actually aggravating factors while the third issue is a mitigating factor" (Petitioner's Brief, hereinafter "Pet. Br.," at 9), thus misperceives the nature of the special issues.

defendant nonetheless will be sentenced to life imprisonment rather than death. Tex. Code Crim. Proc. Ann. art. 37.071(e) (Vernon Supp. 1988).¹⁸ Cf. *Mills v. Maryland*, ___ U.S. ___, 108 S. Ct. 1860, 1865-66 (1988) (it is impermissible to require jury to unanimously agree on presence of mitigating factor before it can decide not to impose death sentence).

The trial court, as it did in this case, instructs the jury to consider all of the evidence presented at trial in making its decision, reminds it that the state bears the burden of proof beyond a reasonable doubt, and informs it that the jurors must agree unanimously before any of the special issues can be answered affirmatively. All of these safeguards ensure that death sentences in Texas represent a reasoned response to the evidence and ensure a reliable sentencing result. They would be undermined by requiring the jury to consider whether the defendant should be spared because the jury feels sympathy for him. Were the Court to adopt this position, the state's efforts to guide the jury's discretion would be rendered a nullity, and the jury's answers to the special issues would be meaningless. After focusing on the defendant before it and on the factors relevant to the sentencing determination, the jury then would have to be asked to ignore the evidence and to abandon rationality, deciding simply, on the basis of emotion and whim, whether the defendant should be sentenced to death or to life imprisonment.

Constitutionalizing mercy as a factor in the process of imposing the death penalty would make it

¹⁸Most states require that the jury find by a preponderance of the evidence that mitigating circumstances exist and that they outweigh the aggravating factors before a life sentence may be imposed. Texas' system requires much more of the state and imposes a far lighter burden on the defendant.

impossible to distinguish from the record "the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring). Appellate review, one of the elements of capital sentencing statutes that the Court has hailed in the past for bringing rationality into the system, *Gregg v. Georgia*, 428 U.S. at 198, would be impossible. If the Court is prepared to accept Penry's argument that the consideration of mercy is a constitutional requirement, then it will have traveled full circle since *Furman*, holding that the very aspect of capital punishment that once made it unconstitutional totally unguided juror discretion--now is necessary to comply with the eighth amendment. Cf. *Lockett*, 438 U.S. at 631 ("By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.") (Rehnquist, J., concurring in part and dissenting in part).

3. The Texas system allows jurors to express feelings of sympathy while retaining the rationality of the process for imposing a death sentence.

Moreover, Penry is mistaken in his belief that the Texas statute does not allow for the jury's consideration of feelings of sympathy. When the Court invalidated the state's exclusion for cause of prospective jurors whose verdicts would be "affected" by the possibility of a death sentence, it recognized that the jurors' responses were likely to be expressions of the seriousness or gravity with which they invest their deliberations, their emotional involvement in the facts of the case, or that the prospects of the death penalty "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt."

Adams v. Texas, 448 U.S. 38, 49-50 (1980). In the same way, feelings of sympathy related to an aspect of the defendant's crime or character may be expressed by the manner in which a juror ascribes weight to the defendant's mitigating evidence or in which he determines what constitutes a reasonable doubt. Thus, the Texas system not only provides the jury with a mechanism for taking into account its human feelings of sympathy in weighing the evidence before it, it does so in a manner that does not destroy the rationality of the sentencing process. See *Franklin*, ___ U.S. at ___ n. 12, 108 S.Ct. at 2331 n. 12.

Penry attempts to strengthen his claim by arguing that the jurors are required to take an oath under Tex. Penal Code § 12.31(b) (Vernon 1973) that the mandatory penalty of death or imprisonment for life will not affect their deliberations on any issue of fact. This argument is legally and factually incorrect. Under Texas law, no § 12.31(b) oath is required. *White v. State*, 629 S.W.2d 701, 704 (Tex. Crim. App. 1981). The oath administered to the jury is set forth in Tex. Code Crim. Proc. Ann. art. 35.22 (Vernon 1966).

You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and evidence, so help you God.

The voir dire of Evelyn Stephens, the first juror selected, reflects that the Article 35.22 oath was the one administered (SF VIII 169). After the jury had been selected, the jurors were sworn as a group (SF XIII 1333). Texas law provides that the Texas appellate court presume the jurors were properly sworn in accordance with Article 35.22. Tex. Code Crim. Proc. Ann. art. 4424a (Vernon Supp. 1987). Further, as the Texas Court of Criminal Appeals found, Penry con-

ceded on direct appeal that the state did not inquire if the venire members would be affected by the prospect of the death penalty, and no venire member was excluded under § 12.31(b). *Penry v. State*, 691 S.W.2d at 656. The record does not bear out Penry's claim that the jury was sworn under § 12.31(b).

C. None of Penry's other requested instructions would have increased the reliability of the result of the sentencing proceeding.

Before the jury was instructed at the penalty phase of the trial, Penry objected that the charge contained no definition of the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society," as used in the punishment issues (J.A. 210-11). He also objected that the charge failed to instruct the jury that a death sentence could not be imposed unless the state proved beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and that the jury could return a negative answer to one of the special issues if it felt that Penry should not be executed, even if it found beyond a reasonable doubt that the issues should be answered affirmatively. The objections were overruled (J.A. 210-13). Penry contends that the charge as given reduced his jury argument to "jury nullification" and effectively precluded the jury from considering his mitigating evidence.

Unless a term is specially defined by the Legislature, "[a]ll words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language...." Tex. Code Crim. Proc. Ann. art. 3.01 (Vernon 1974). The Texas Legislature has considered the terms in the special punishment issues to have meanings sufficiently understood

by ordinary jurors that it has not specially defined them. This Court, too, has recognized that the terms in the punishment issues contain a "common-sense core of meaning" that juries are capable of comprehending without additional definition. *Pulley v. Harris*, 465 U.S. 37, 49 n.10 (1984), quoting *Jurek v. Texas*, 428 U.S. at 279 (White, J., concurring). Penry has made no attempt to demonstrate how the jurors in his case could have understood the words to mean anything significantly different, much less that their understandings of the terms prevented them from giving effective consideration to his mitigating evidence.¹⁹ If the terms did "strike distinct chords in individual jurors, or play to differing philosophies and attitudes, nothing more is at work than the jury system." *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984), cert. denied, 471 U.S. 1930 (1985). Penry and other capital murder defendants can urge during argument that the jury accept a definition of the terms that works most to their advantage. To this extent, they may actually benefit by not having definitions provided by the trial court.

Penry's claim concerning the court's failure to instruct the jury that the state must prove beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors likewise is without merit. The jury was informed of the effects of its answers to the special issues, and it was instructed that the state must prove beyond a reasonable doubt that the punishment issues should be answered

¹⁹It should be noted that although Penry objected to the court's charge for failing to include definitions of these terms, he did not submit proposed definitions of his own. At no time during the extensive litigation of his claims in the state and federal courts has he suggested how the terms might be defined to render a more rational result.

affirmatively (J.A. 25). In determining whether the state had met its burden, the jury necessarily had to consider whether the mitigating evidence raised a reasonable doubt as to the issues. Because the jury knew that three affirmative answers to the special issues would result in the death penalty being imposed, it was "likely to weigh mitigating evidence as it formulate[d] these answers in a manner similar to that employed in 'pure balancing' States." *Franklin*, ___ U.S. at ___ n. 12, 108 S.Ct. at 2331 n. 12. Penry has shown neither that the trial court's failure to give his requested instruction prevented the jury from considering his mitigating evidence, nor that giving such an instruction would have enhanced the reliability of the result.

Finally, Penry's claim that the jury should have been instructed that it could return an answer of "no" to one of the punishment issues even though it was convinced beyond a reasonable doubt that the answer should be "yes," simply because it felt that the death penalty should not be imposed, is foreclosed by *Jurek*. In upholding the constitutionality of the Texas capital sentencing statute, the Court approved the Texas system of assessing the death penalty after the jury has returned affirmative answers to the special issues. To hold that Penry's requested charge must be given in Texas capital murder trials would require overruling *Jurek*. Inasmuch as Penry expressly renounces any intention to have the Court overrule *Jurek*, his claim must fail. See *Franklin*, ___ U.S. at ___, 108 S.Ct. at 2330.

II.

IT IS NEITHER CRUEL NOR UNUSUAL TO EXECUTE A DEATH-SENTENCED INMATE WHO IS OF LIMITED MENTAL CAPACITY BUT WHO WAS ADJUDGED SANE AT THE TIME OF THE OFFENSE AND COMPETENT TO STAND TRIAL AND WHO UNDERSTANDS THE NATURE OF THE PENALTY HE IS TO SUFFER AND THE REASON HE IS TO SUFFER IT.

Penry relies on *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Thompson v. Oklahoma*, ___ U.S. ___, 108 S. Ct. 2687 (1988), to support his assertion that the eighth amendment proscription against cruel and unusual punishment forbids the execution of the mentally retarded. Inasmuch as those decisions focus on the mental state of the defendant at different stages in the criminal justice process, Penry is urging alternative bases for his position.

In *Ford*, there was no question as to the defendant's sanity at the time of the offense or his competency to stand trial. It was only after he was convicted and sentenced to death that Ford began to manifest delusions indicative of severe mental illness. The Court, relying heavily on the common law, held that the eighth amendment prohibits the execution of an insane prisoner. *Ford*, 477 U.S. at 410. Justice Powell, in concurrence, expressed the opinion that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422. (Powell, J., concurring).

Although Penry relies on *Ford* to the extent he argues that he fits within the class of "idiots or

lunatics," that case does not support his position. Whereas *Ford* was concerned with the prisoner's mental state at the time of execution, the test proposed by Penry focuses on the defendant's mental state at the time of commission of the offense:

The reason for not executing a mentally retarded person is that he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his crime. Mental retardation is a factor that mitigates against assessing the maximum punishment of death. Accordingly the test for determining if a mentally retarded defendant can be executed should be whether because of mental retardation the defendant has a deficit in adaptive behavior that significantly reduces his ability to learn from mistakes.

(Pet. Br. at 37) (citation omitted).

The state thus understands Penry's argument to be that his mental retardation is akin to insanity at the time of the offense, inasmuch as both defenses are concerned with the defendant's state of mind at the time he engages in criminal behavior. Penry raised an insanity defense at trial, and the jury rejected it. Penry now analogizes himself and other mentally retarded defendants to youthful offenders, who by virtue of their age and inexperience, are generally regarded as less culpable for their actions. *Thompson v. Oklahoma*, ___ U.S. at ___, 108 S. Ct. at 2698-2700.

A. *There is no national consensus that mentally retarded prisoners should not be executed.*

In *Thompson*, a plurality of the Court attached particular importance to what it found to be a national consensus that offenders younger than sixteen when they commit their crimes cannot be put to death. To determine the existence of such a consensus, the plurality looked to relevant legislative enactments and jury determinations, *id.* at ___, 108 S. Ct. at 2691-92, which provided "significant affirmative evidence of a national consensus...." *Id.* at ___ n. *, 108 S. Ct. at 2711 n. * (O'Connor, J., concurring). Here, by contrast, Penry has not offered similar data regarding society's views on the execution of persons of his mental caliber. Indeed, to the extent there is any such evidence before the Court, it undermines rather than supports Penry's position.

The *Thompson* plurality found significant that of the thirty-seven states which have capital sentencing statutes, eighteen had established a minimum age of at least sixteen. *Id.* at ___, 108 S. Ct. at 2695. On the other hand, only one state, Georgia, currently forbids the execution of retarded prisoners. Thus, insofar as legislative enactments are pertinent to the Court's inquiry, they strongly indicate that society condones the execution of mentally impaired prisoners such as Penry who commit barbaric homicides.

As for jury determinations, Penry has proffered nothing for the Court's consideration. Instead, he relies on two public opinion surveys and the views of a professional organization, the American Association of Mental Deficiencies, hereinafter "AAMD." (Pet. Br. at 38-39). They are wholly unpersuasive. Penry first refers to a survey commissioned by Amnesty

International, hardly an unbiased source inasmuch as that organization categorically opposes the death penalty. Neither that poll nor the Georgia State survey cited by Penry offer any definition of the phrase "mentally retarded," thus casting some doubt on the accuracy of their results. Indeed, in the Georgia State survey, sixteen percent of those polled were inquisitive enough to respond that their opinion would depend on the degree of mental retardation involved (J.A. 283). Penry offers a definition of mental retardation which includes persons with IQs of 70 or below or upward through 75 or more (Pet. Br. at 36). One must wonder how the results of the poll would have differed had the respondents been apprised of this definition.

The Amnesty International poll is equally flawed. As in the Georgia State poll, the question regarding execution of the mentally retarded embraces no other relevant facts. While the survey indicated that only twelve percent favored the death penalty for a mentally retarded defendant, it also found that an overwhelming majority favored executing a defendant who had committed a series of murders (88%), opened fire on a restaurant full of people (83%) or killed a police officer in the line of duty (72%). What, then, of a mentally retarded defendant whose crime fits into one of those categories? Or, more to the point, what of a mentally retarded defendant who breaks into a woman's home, brutally rapes her, stabs her repeatedly with a pair of scissors and then leaves her covered with blood and moaning for help?

Because of their methodological flaws, both of the surveys cited by Penry fall far short of establishing the sort of national consensus the Court found in *Thompson*. "The most reliable objective signs consist of the legislation that the society has enacted." It will rarely if ever be the case that the members of this

Court will have a better sense of the evolution in views of the American people than do their elected representatives." *Thompson*, ___ U.S. at ___, 108 S. Ct. at 2715 (Scalia, J., dissenting). If public sentiment is in fact in accord with the polls upon which Penry relies, it would seem that that view would have found expression in legislation proscribing the execution of those similarly situated to Penry. That it almost uniformly has not further underscores the dubiousness of their validity.

Penry's reliance on the AAMD is even more unavailing. Other than Penry's assertion that that organization has nearly 10,000 members, he has offered no reason why its views should be accepted by the Court. Compared to the many millions of citizens who reside in this country, 10,000 persons all belonging to a single profession constitute a "small and unrepresentative segment of our society...." *Thompson*, ___ U.S. at ___, 108 S. Ct. at 2719 (Scalia, J., dissenting). Moreover, the Court in the past has refused to be bound by the views of organizations made up of mental health professionals. The American Psychiatric Association has 70,000 members, yet the Court has rejected its position, being unpersuaded "that the view of the APA should be converted into a constitutional rule...." *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983).

B. Constitutional and statutory safeguards currently in place adequately protect the interests of mentally retarded inmates such as Penry.

Penry argues that a blanket proscription against the execution of mentally retarded prisoners is necessary to satisfy the dictate of the eighth amendment that punishment shall be neither cruel nor

unusual. According to Penry, he should not be executed because "he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his crime." (Pet. Br. at 37). In so arguing, Penry wholly fails to acknowledge the following constitutional and statutory provisions which the state must satisfy before it can validly execute him:

1. That he was sane at the time of the offense, *i.e.*, that "as a result of mental disease or defect, [he] either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated." Tex. Penal Code Ann. § 8.01(a) (Vernon 1974); (emphasis added)²⁰ (*see* Tr. 106);

2. That he was competent to stand trial, *i.e.*, that he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as a factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960); J.A. 20);

3. As discussed, *supra* at 21-24, that his act was deliberate, that he probably will be a danger in the future and that his act was unreasonable in response to any provocation. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987); (*see* J.A. 27-28); and

4. That he is sane at the time of his execution. *Ford v. Wainwright*.

²⁰The above quoted statute was in effect at the time of Penry's trial. It since has been amended to delete the phrase "or was incapable of conforming his conduct, etc." *Id.* (Vernon Supp. 1987). Both versions of the statute include the phrase "mental defect" and thus are broad enough to encompass mentally impaired defendants such as Penry.

All of these safeguards are designed to ensure that capital defendants of subnormal intellect receive the type of individualized consideration which the Constitution requires. In particular, the insanity defense and the Texas punishment issues are concerned with the accused's mental state at the time of the offense. The jury must find the defendant to be sane before it may convict him of a capital offense and must consider his mitigating evidence of retardation before it may assess a sentence of death. Penry has wholly failed to suggest how a total ban against the execution of the mentally retarded will in any way render the system more evenhanded or how individual sentencing determinations will thereby be more reliable. This Court should refuse to impose additional requirements on the states when the above provisions already in effect "are adequate means of vindicating the constitutional rights of the accused." *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 268 (1982).

C. This Court should not relegate administration of the criminal justice system to mental health professionals.

Penry provides the Court with a psychiatric definition for mental retardation and then claims the reason executing mentally retarded persons is cruel is different than that for the insane, since the psychiatric symptoms of mental retardation and insanity differ. In doing so, Penry explicitly urges the Court to adopt clinical standards of mental illness to decide who should face execution. In *Ford*, however, the Court grounded its prohibition against the execution of insane people upon no such interpretation of clinical standards of mental illness. Rather, the Court looked to the common law understanding of mental deficiency for

guidance, expanding the reach of its principles from the determination of criminal responsibility and competence to stand trial to cover the execution of capital sentences. Justice Marshall, writing for the majority, harked back to the common law in order to find that executing the insane prisoner in *Ford* would be cruel:

This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of the insane. It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England.

Ford, 477 U.S. at 408-09. Justice Powell, writing in a concurring opinion, concluded that the boundaries of "insanity" under the eighth amendment mirrored those found in the common law:

The bounds of that category [mental state] are necessarily governed by federal constitutional law. I therefore turn to the same sources that give rise to the substantive right to determine its precise definition: chiefly our common law heritage and the modern practices of the States, which are indicative of our "evolving standards of decency."

Id. at 419. "Evolving standards of decency" under the eighth amendment, then, means not the latest pronouncement of academics or professional societies or the results of the most recent public opinion survey, but those mores and concepts tested by English and American courts over the centuries. When used in the legal sense, terms such as "insanity" and "mental retardation" derive their meaning not from current psychiatric standards but from their common law roots.

The history of the insanity defense illustrates this point. English and American courts at common law, when deciding whether to absolve defendants of criminal responsibility on grounds of insanity, have shunned a slavish adherence to medical categories. Instead, courts have studied the effect of a defendant's mental deficiency on his ability to make sound moral judgments. The English Court of Common Pleas, for example, formulated what is commonly known as the "Wild Beast Test" in the early eighteenth century case of *Rex v. Arnold*, 16 How.St.Tr. 695 (1724):

...it must be a man that is totally deprived of his understanding and memory, and *doth not know what he is doing*, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.

Arnold, 16 How.St.Tr. at 765 (emphasis added).

A century later, the House of Lords fashioned the most famous test for deciding which mentally deficient people should go free from criminal liability in *Daniel M'Naughten's Case*, 8 Eng. Rep. 718 (H.L. 1843). Under the M'Naughten Rule, a court cannot convict a defendant if, at the time he committed the act, he labored under a defect of reason or from a disease of the mind that either prevented him from knowing the nature and quality of his acts or that clouded his moral judgment to such a degree that he did not know his act was wrong. The M'Naughten Rule is based not on clinical labels slapped on the defendant by experts, but instead on the defendant's ability to grasp common sense notions of right and wrong.

The broad language of the common law insanity tests have spilled over the narrow channels of

psychiatric categories. As a result, American courts have applied insanity tests to defendants with a large assortment of mental disorders, including mental retardation. Courts consistently have held that mental retardation, in itself, excuses no defendant from criminal responsibility where there is no evidence that a defendant is incapable of fathoming the difference between right and wrong, thus warranting no insanity instruction to a jury. *E.g.*, *State v. Pinski*, 163 S.W.2d 785, 788 (Mo. 1942); *State v. Johnson*, 290 N.W. 159, 162 (Wis. 1940); *Wartena v. State*, 5 N.E. 20, 23 (Ind. 1886). Almost all American jurisdictions, Texas included, now consider mental retardation or subnormality to be a form of "mental defect" within their common law and statutory insanity defenses. 2 P. Robinson, *Criminal Law Defenses* 314 nn. 2,3 (1984).

The common law's functional, rather than clinical, approach to mental deficiency and criminal responsibility has carried over to areas such as competence to stand trial and the execution of death sentences. Early English courts, for instance, were more interested in a defendant's ability to understand the nature of the proceedings against him and to present a defense than if he fit into some medical category. As Blackstone elaborated:

[I]f a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?

4 W. Blackstone, *Commentaries of the Law of England* *24.

That a functional measure of competence, rather than a clinical one, has determined incompetence was demonstrated in the nineteenth century by the North Carolina Supreme Court in *State v. Harris*, 53 N.C. (8 Jones) 136 (1860). The *Harris* court held that a deaf mute prisoner, who could not be made to understand the meaning of his trial, was incompetent to stand trial, just as one who is mentally deficient: "[w]hether arising from physical defect or mental disorder, he must, under such circumstances, be deemed 'not sane,' and . . . he ought not to be tried." *Id.* at 143.

The unflagging allegiance of English and American courts to functional, instead of clinical, tests hardly results from judicial backwardness or mere historical accident. Using psychiatric categories to judge the mental deficiency of those who face execution presents serious problems.

First, reliance on psychiatric categories would prove inequitable over time, since such categories can change so as to alter the scope of a constitutional right without the benefit of a legislative or judicial act. For instance, the American Psychiatric Association considered homosexuality a clinical mental disorder until the 1970's. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S.Cal.L.Rev. 527, 557 (1978). By the same token, experts at one time did not consider sociopathy to be a mental disease but then subsequently recognized it as such. See *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959).²¹ Moreover, deciding who should be executed on the basis of purely psychiatric arguments would replace the discretion of courts with the tyranny

²¹For more on the pitfalls of measuring and defining the human intellect, see S. J. Gould, *The Mismeasure of Man* (1981).

of experts, as the Pennsylvania Supreme Court warned in *Commonwealth v. Elliot*, 89 A.2d 782 (Pa. 1952):

[t]his contention carries the theory...to an extreme and would vest in a psychiatrist and not in the Courts the right and power to determine and fix punishment for crimes...and would inevitably result in a further break down of law enforcement and eventual confusion and chaos.

Id. at 785.

Penry, on the other hand, would have courts try to force defendants into psychiatric pigeon-holes, which may or may not bear any logical relationship to whether a defendant comprehends the consequences of his actions or society's act of retribution against him. Penry's arguments fly in the face of well settled constitutional and common law principles. While Penry bombards the Court with psychiatric and opinion survey evidence, he offers the Court no compelling reason why it should casually discard legal concepts that have served both English and American courts well for hundreds of years. Penry provides no clue as to how these rules were somehow unjustly applied in his case. He gives the Court little, if any, guidance of what workable alternative standards the Court could adopt to decide which mentally deficient persons would be exempt from execution.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER*
Assistant Attorney General

WILLIAM C. ZAPALAC
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Attorneys for Respondent

* *Counsel of Record*

APPENDIX A

WILLIAM BURNS, Appellant

No. 69,641 v. Appeal from BOWIE County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of the offense of capital murder, and, in accordance with affirmative answers rendered by the jury to the three special issues submitted at the punishment phase pursuant to Article 37.071, V.A.C.P., the trial court assessed his punishment at death. Direct appeal to this Court is automatic. *Id.*

Appellant challenges sufficiency of the evidence to support the jury's affirmative answer to special issue two, which inquires "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Thus we turn to the evidence adduced, beginning with the circumstances of the offense itself, which this Court has repeatedly held may alone sustain an affirmative answer to special issue two if "severe enough." E.g., *King v. State*, 631 S.W.2d 486 (Tex.Cr.App. 1982); *Muniz v. State*, 573 S.W.2d 792 (Tex.Cr.App. 1978); *Burns v. State*, 556 S.W.2d 270 (Tex.Cr.App. 1977).

While every murder committed in the course of a robbery is "senseless," *Roney v. State*, 632 S.W.2d 598 (Tex.Cr.App. 1982), neither the facts of the instant offense, nor appellant's participation therein, appears so heinous or shocking as to evince a particularly "dangerous aberration of character." *King v. State*, supra, at 504; *Cass v. State*, 676 S.W.2d 593, at 593 (Tex.Cr.App. 1984). The record shows that sometime close to midnight on Friday, March 27, 1981, twenty-

two year old appellant and two companions, his brother Victor, and Danny Ray Harris, proceeded to the Texarkana Wood Preserving Company with the apparent intent to rob whomever they might find working there. Appellant had at one time worked the late shift at the creosote plant, and "would have known" an employee would be working late to stoke the fire in the boiler. Furthermore, appellant could have anticipated this person would be carrying an appreciable sum of money because he knew Friday was payday. There is some indication appellant was under the influence of "dope" of an unspecified powdered variety which he had ingested through his nose sometime shortly before the three set out.

What happened at the creosote plant may be gleaned from a pair of statements appellant gave afterwards. As they approached the plant, appellant carried a .22 caliber Winchester rifle that Victor had retrieved from the trunk of his car. Additionally, tucked into appellant's pants was a .22 caliber pistol. Through a crack in the tin wall of the "treating room" of the plant, appellant observed Johnny Lynn Hamlett, the deceased, an eighteen year old high school senior, who was working the late shift that night. His cohorts urged appellant to shoot Hamlett with the rifle. Instead appellant handed it to Harris, who stepped around to a "big opening . . . on the side where the conveyor belt goes in." Appellant pulled out the pistol and fired off the only two rounds it contained through the crack. Next appellant "heard the rifle start popping off." Ten or eleven shots were fired from the rifle, in appellant's estimation.¹ According to the

¹Expert testimony established Hamlett sustained fourteen gunshot wounds. Eight .22 caliber "hulls" shown positively to have been fired from the Winchester rifle were found at the scene. Eleven bullets were recovered from the body. Ballistics tests

(footnote continued on next page)

autopsy, Hamlett died "of multiple gunshot wounds of the neck, chest and head."

Harris took Hamlett's wallet, emptied it of the \$110.00 it contained, which he split with Victor, and, after starting to throw the wallet away, gave it instead to appellant, who "didn't have a billfold and . . . wanted one." Appellant had the wallet on his person when he was arrested several weeks later. Inside the wallet police found a brief newspaper article chronicling early stages of the investigation of Hamlett's killing.

In final argument the prosecutor invited the jury to find appellant guilty as a party on the basis of the above evidence, thus:

"We had to prove that William Burns did this. You have seen the evidence of that. You have seen and heard his statement where he tells you he shot twice. You remember the law of parties? If you aid, encourage, assist in any way? It's in the charge. You can read it. He told you he did that."

At the punishment stage it was shown that approximately a year before the murder of Hamlett, on the night of February 23, 1980, appellant was involved in another killing in the parking lot of a nightclub. With appellant apparently somewhere nearby, his brother Victor shot one Leon Callahan in the back. The shot proved fatal. Appellant asked Victor, "did he get him." Then the two Burns brothers "grabbed"

(footnote continued from previous page)

indicated seven of these could have been fired from the Winchester rifle. Two more were definitely not fired from the Winchester, but could have come from a pistol. Origin of the last two bullets could not be determined to any degree.

Callahan's companion, Bryan Sanders, and forced him into their car. On the way out of the parking lot Victor shot at Callahan's tires. With appellant driving, they started out for Texarkana Lake, where, the brothers told Sanders, he was to be killed. Instead appellant stopped the car on the side of the highway. He told Sanders he had a shotgun in the trunk and proceeded to open it. When Sanders intervened, a fistfight ensued. Within a minute or two a passing Highway Patrolman arrived to stop the altercation. Appellant and his brother were arrested.

Two police officers testified they knew appellant's reputation in the community for being peaceable and lawabiding to be bad. With this, the State rested. No psychological or psychiatric testimony was presented relating to appellant's potential for future dangerousness. Other than the unadjudicated murder and kidnapping, the State presented no criminal record or past criminal history. Appellant produced five citizens and three family members to testify his reputation for peaceableness was good. No other mitigating evidence was admitted.

Over the past dozen years this Court has articulated its standard for appellate review of sufficiency of evidence to support an affirmative answer to special issue two in a number of ways. We have consistently said we view the evidence in the light most favorable to the jury's answer, e.g., *Starvaggi v. State*, 593 S.W.2d 323, 325 (Tex.Cr.App. 1979),² without clearly explicating what view of the evidence

²*Starvaggi* cites *Warren v. State*, 562 S.W.2d 474 (Tex.Cr.App. 1978) and *Granviel v. State*, 552 S.W.2d 107 (Tex.Cr.App. 1977), as authority for this standard. Although as a practical matter each of those opinions may "view the evidence in the light" Judge Phillips found they do in *Starvaggi*, neither opinion expressly indicates that is the standard being utilized therein.

would be the most favorable in light of the jury's constitutional function to weigh any proffered evidence in mitigation. In other instances, seemingly more mindful of that function, we have held that the evidence was such that "the jury was justified in finding that the aggravating factors outweighed the mitigating factors[.]" e.g., *Duffy v. State*, 567 S.W.2d 197, 209 (Tex.Cr.App. 1978); *Demouchette v. State*, 591 S.W.2d 488, 492 (Tex.Cr.App. 1979); thus suggesting "a more substantive review" of the evidence than had been conducted in other cases. See *Dix*, Appellate Review of the Decision to Impose Death, 68 Geo.L.J. 97, 151 (1979). As if to disown that notion, however, the Court has at least on one occasion combined these two pronouncements, finding that "the evidence, viewed in a light most favorable to the verdict, is sufficient for the jury to have found that the mitigating factors introduced by appellant did not outweigh the aggravating factors and that there is a probability that appellant would commit acts of violence that would constitute a continuing threat to society." *Green v. State*, 682 S.W.2d 271, 289-90 (Tex.Cr.App. 1984).³ Recent decisions have abandoned altogether the inquiry whether the evidence would justify a jury finding that aggravating factors outweighed mitigating. Instead, the Court has begun

³Viewing mitigating evidence in the light most favorable to the jury's answer in this particular context may mean in some cases actually considering evidence proffered in mitigation, such as youth, drug dependency, a history of child abuse, etc., though in a broader sense it may "moderate blameworthiness," nevertheless to militate in favor of an affirmative answer in the narrower confines of special issue two itself. See *Stewart v. State*, 686 S.W.2d 118, 125-26 (Tex.Cr.App. 1984) (Clinton, J., dissenting). Thus, not only do we fail to instruct juries they may accord independent weight to factors that are in the broader sense "mitigating," *id.*, manifestly we also fail to recognize the independent significance of such evidence on appeal.

to apply an unadulterated *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard, beginning with *Fierro v. State*, 706 S.W.2d 310 (1986). A typical articulation of the standard appears in *Harris v. State*, 738 S.W.2d 207, at 225-26 (Tex.Cr.App. 1986):

"When we view the facts, we must evaluate the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have made the finding beyond a reasonable doubt."

See also *Alexander v. State*, 740 S.W.2d 749, 761 (Tex.Cr.App. 1987) ("... applying the 'rational trier of fact' test"); *Livingston v. State*, 739 S.W.2d 311, 340 (Tex.Cr.App. 1987) ("whether the evidence . . . would lead any rational trier of fact to make the finding"). Thus has the Court narrowed its focus on appeal to "whether a rational trier of fact could have found the elements of Art. 37.071(b)(2), *supra*, beyond a reasonable doubt[.]" *Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Cr.App. 1987), opining that this appellate standard will adequately serve to "make certain that the death sentence is not 'wantonly or freakishly' imposed[.]" *Id.*, at 63.⁴ See also *Beltran v. State*, 728 S.W.2d 382, 389-90 (Tex.Cr.App. 1987); *Cockrum v.*

⁴Thus, also, have we abandoned any pretense of this Court balancing mitigating and aggravating evidence so as to determine, independently of the jury's verdict, the "appropriateness" or "justness" of imposition of the death sentence in a given case. See *Dix*, *supra* at 150-51. In view of *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), it is doubtful whether Eighth Amendment or Due Process considerations absolutely require this Court to reweigh punishment evidence, though our "prompt judicial review of the jury's decision" was an important consideration in the Supreme Court's imprimatur of our death penalty scheme. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

State, ___S.W.2d___ (Tex.Cr.App., No. 69,766, delivered September 14, 1988).

Measuring the evidence adduced in the instant case to prove future dangerousness against this standard, we find, not without some trepidation, that it is sufficient. Though it is likely the jury accepted the prosecutor's invitation to convict appellant as a party to Danny Ray Harris' act of shooting Hamlett repeatedly with the .22 rifle, appellant himself admitted to firing his pistol twice at the deceased, and at least two of the recovered bullets appear to have come from that gun. See n. 1, *ante*. Though acting at the instigation of his companions, appellant was under no duress or domination so far as the record reveals. Approximately a year before, appellant participated as a party to his brother's killing of another individual, and took a principal role in the aggravated assault and kidnapping of yet another. Thus the record reflects at least a bare repetition of deadly violence on appellant's part toward others. There was evidence, albeit contested, that his reputation for peaceableness was not good. Finally, a reasonable jury might have inferred from his possession of the newspaper clipping that appellant took a dispassionate, or even prideful view of his part in Hamlett's death.

We would not say on this quantum of evidence that appellant has been proven beyond peradventure to be completely incorrigible. However, following our precedents, we conclude it represents more than a "mere modicum" of evidence to support the jury's conclusion it is probable he would commit criminal acts of violence that would constitute a continuing threat to society. *Jackson v. Virginia*, U.S. at 319-20, S.Ct. at 2789, L.Ed.2d at 573-74. This point of error is overruled.

In his second point of error appellant contends the trial court erred in failing to admit testimony offered at the punishment phase of trial from his mother relative to his family background and his employment history. We agree.

Appellant called his mother, Vergie Burns, as his last witness at the punishment phase. She testified appellant was the second oldest of seven children, and that her husband had died six years before trial, which would have been around the time appellant committed the instant offense. Over relevancy objections, counsel next attempted to explore appellant's family and employment background, in the following exchange:

"Q All right, were you and [your husband] together all the time you were married?

[Prosecutor]: Your Honor, . . . we would object on the basis of relevance.

THE COURT: Sustained."

Mrs. Burns next testified appellant had grown up in her home and had finished high school. Then:

"Q What type of jobs did [appellant] have after he finished school?

[Prosecutor] Your honor -- excuse me. Once again we would object on the basis of relevancy.

THE COURT: Sustained."

Her brief testimony concluded with her assertion she did not think appellant "will be a threat to anyone in the future."

Immediately before the punishment charge was read, appellant made the following bill of exceptions outside the jury's presence:

"Q Were you and your husband together all the time that you were married?

A We separated for a few years, but we still communicated with each other.

Q Your Honor, had we been permitted to have that question answered, I would have followed it up with questions to develop it further. Can I do that at this time?

THE COURT: No, that's not a part of that. I sustained the objection to one single question as being immaterial and irrelevant to any issue before the Court. You can make your bill on those questions, only.

Q The other question is as follows, Mrs. Burns. What types of jobs did [appellant] have after he finished school?

A He worked at St. Michael's Hospital, he worked over to the wood preserving plant, and he worked at Central Christian Church.

Q Is that all? Is that all?

A That's all I can think of."

Counsel did not request that the trial court reopen the evidence so that he could propound followup questions before the jury pertaining to appellant's upbringing. See Article 36.02, V.A.C.C.P.

In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the Supreme Court held that "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, U.S. at 304, S.Ct. at 2991, L.Ed.2d at 961. Because North Carolina's mandatory provision precluded such consideration, it was struck down as violative of "the fundamental respect for humanity underlying the Eighth Amendment." *Id.* Subsequently, building upon the *Woodson* foundation, a plurality of the Supreme Court held in *Lockett v. Ohio*, 438 U.S. 602, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, U.S. at 604, S.Ct. at 2964-65, L.Ed.2d at 990. Exclusion of such evidence, it was observed, "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990. A majority of the Court later embraced the holding of *Lockett*, *supra*, in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). There the Court opined:

"The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

Id., U.S. at 114-15, S.Ct. at 877, L.Ed.2d at 11. See also *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Hitchcock v. Dugger*, 481

U.S.____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Franklin v. Lynaugh*, 487 U.S.____, 108 S.Ct.____, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring).

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 929 (1976), the Supreme Court premised its recognition of the constitutionality of our death penalty procedure on the understanding that Article 37.071, *supra*, would prove sufficiently flexible to allow jury consideration of "all possible relevant information about the individual defender whose fate it must determine." *Id.*, U.S. at 276, S.Ct. at 2958, L.Ed.2d at 941. Citing *Woodson v. North Carolina*, *supra*, the Court first observed:

"A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."

Id., U.S. at 271, S.Ct. at 2956, L.Ed.2d at 938. The Court then upheld our statutory scheme because it found:

"Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that . . . the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

In conclusion the Court reiterated:

"By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function."

Id., U.S. at 276, S.Ct. 2958, L.Ed.2d at 941.

In *Quinones v. State*, 592 S.W.2d 933, at 947 (Tex.Cr.App. 1980), this Court observed, in keeping with *Jurek v. Texas*, and *Lockett v. Ohio*, both *supra*, that the defendant "was entitled to present evidence of any mitigating circumstances..., including a broad discussion of his personal and family background." The instant case does not present a question, as in *Quinones*, *supra*, of whether an instruction was necessary to explain the use the jury could put that evidence to. Indeed, *Quinones* itself teaches that "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence."⁵ Thus, we presume the jury will understand the significance of evidence proffered in mitigation, and will give such evidence mitigating weight, at its discretion, in resolving special issues. Today we treat only the question whether such evidence should have been admitted.

⁵Whether the jury will also understand the "logical relevance" of evidence which has potentially mitigating weight and significance independent of its applicability to special issues is, at least to the mind of the instant writer, a separate question. See *Franklin v. Lynaugh*, *supra* (O'Connor, J., concurring); *Penry v. Lynaugh*, 832 F.2d 915 (CA5 1987).

We hold that it should have been. Mrs. Burns' answer to the question pertaining to the stability of her marriage during appellant's upbringing at least tended to show a troubled childhood. While failing to request a reopening of the evidence to proffer further questions along these lines before the jury, appellant at least made it clear he was prepared to do so if permitted. That subsequent to finishing high school appellant obtained employment in such venues as a hospital and a church would surely prove informative to a jury engaged in the necessarily speculative enterprise of assessing his ability to coexist peacefully in society.

We have held that Article 37.071, *supra*, affords the trial court wide discretion at the punishment phase of a capital murder trial in deciding admissibility of evidence. E.g., *Smith v. State*, 683 S.W.2d 393, 405 (Tex.Cr.App. 1984); *Turner v. State*, 698 S.W.2d 673, 675 (Tex.Cr.App. 1985). We conclude that the trial court in the instant cause abused that discretion in failing to admit Mrs. Burns' answers. It is true that the mitigating impact of those answers would not appear to be compelling in the abstract. On the other hand, though this Court's precedents dictate a finding that the evidence is legally sufficient to support the jury's reply to special issue two, neither do we believe the State's evidence in support of that verdict to be particularly compelling. We cannot say that, on balance, the jury could not have found appellant's proffered evidence of some, perhaps even critical significance. Consistent with *Lockett*, *supra*, and its progeny, and particularly in light of the limited role this Court has assumed in reviewing appropriateness of death verdicts in capital cases, we cannot tolerate the risk that appellant has been sentenced to death in spite of factors a reasonable jury could find justify the less severe penalty of life imprisonment.

Accordingly, the judgment of the trial court is reversed and the cause is remanded for new trial. Article 44.29(c), V.A.C.C.P.

CLINTON, Judge

(Delivered: October 19, 1988)
EN BANC
PUBLISH

Teague, J., concurs in the result.
Onion, PJ. and Davis, McCormick and White, JJ.,
dissent.

12

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIO, JR.
CLERK

No. 87-6177

**IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988**

JOHNNY PAUL PENRY,

Petitioner,

v.

**JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,**

Respondent.

**On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

RESPONDENT'S SUPPLEMENTAL BRIEF

JIM MATTOX
Attorney General of Texas

CHARLES A. PALMER*
Assistant Attorney General

MARY F. KELLER
First Assistant
Attorney General

WILLIAM C. ZAPALAC
Assistant Attorney General

LOU McCREARY
Executive Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

*** Counsel of Record**

6 pks

No. 87-6177

**IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988**

JOHNNY PAUL PENRY,

Petitioner,

v.

**JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,**

Respondent.

**On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

RESPONDENT'S SUPPLEMENTAL BRIEF

**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:**

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent¹ herein, by and through his attorney, the Attorney General of Texas, and files this Supplemental Brief.

I.

In his opening brief Penry argued that two public opinion surveys support his position that there is a national consensus that mentally retarded

¹For clarity, Respondent is referred to as "the state," and Petitioner as "Penry."

prisoners under sentence of death should not be executed. The state, in response, pointed out flaws in those polls which cast substantial doubt on their validity (Respondent's Brief at 40-42).

II.

Since the filing of the state's brief, the results of another poll on this subject have been released. An organization called Texas Poll has conducted a survey in the State of Texas, the results of which are attached hereto as an appendix. According to that poll of 1,008 persons, 86% favor capital punishment but 73% oppose capital punishment for the mentally retarded.

As in the polls cited by Penry, this latest survey has serious methodological problems which render its results virtually meaningless. The question regarding execution of the mentally retarded embraces no other relevant facts such as the details of the crime, the definition of "mentally retarded" or the degree of retardation of the defendant. Indeed, as worded, the question could be understood to ask whether a defendant should be executed simply *because* he is retarded. Further, without the guidance of a definition or other instructions, a layman would equate "mentally retarded" with "doesn't know what he's doing," a highly misleading assumption given that Penry's jury rejected the insanity defense he advanced based on his mental retardation. Mental retardation occurs in varying degrees of severity, and there are, of course, retarded individuals who truly do not know what they are doing and are therefore "insane" in the legal sense. Penry does not fit into that category, however. Given the horrible crime that Penry committed and his awareness of the consequences of his actions, he should not avoid being justly punished simply by virtue of his inclusion in a category referred to by mental health professionals as "retarded."

The polls upon which Penry relies support his position only because of the misleading way in which the questions were worded. The state could argue with equal logic that 86% of those polled favor execution of the mentally retarded because they made no such qualification in responding affirmatively to whether they favor capital punishment. In short, the public opinion surveys upon which Penry relies are wholly unreliable and should be given no weight by this Court.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

APPENDIX A

CHARLES A. PALMER*
Assistant Attorney General

WILLIAM C. ZAPALAC
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Attorneys for Respondent

**Counsel of Record*

THE TEXAS POLL
1005 Congress Ave.
Suite 740
Austin, Texas 78701
(512) 478-9646

The second set of press releases from the Fall Texas Poll is enclosed.

* * * * *

Here is the exact wording of questions used in the enclosed stories:

* * * * *

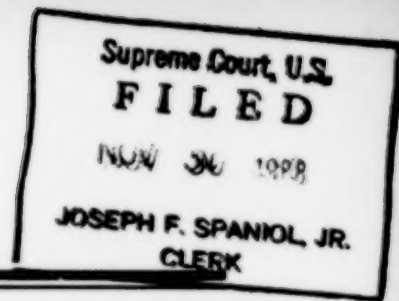
CPI. Do you think that Texas should have capital punishment?

Yes	86
No	10
Don't know/Refused/NA	4

CP3. Should capital punishment be used in cases where the person is mentally retarded?

Yes	11
No	73
Don't know/Refused/NA	16

(13)
No. 87-6177



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

CURTIS C. MASON
Attorney for Petitioner
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 295-6371 Ext. 1370

TABLE OF CONTENTS

	Page
THE THREE SPECIAL ISSUES ARE INADEQUATE FOR THE JURY TO FULLY CONSIDER PENRY'S MITIGAT- ING EVIDENCE	1
THE MENTALLY RETARDED SHOULD NOT BE EXECUTED	6

TABLE OF AUTHORITIES

Cases	Page
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	2, 3
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	2, 3
<i>Hitchcock v. Dugger</i> , ____ U.S. ____, 107 S.Ct 1821 (1987)	3
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976)	3, 5
<i>Lane v. State</i> , 743 S.W.2d 617 (Tex. Cr. App. 1987)	5
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	2
<i>Proffitt v. Florida</i> , 428 U.S. 242 (1976)	3
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986)	3
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	2
STATUTES	
Art. 37.071 (d)(2) Texas Code Criminal Procedure	4
BOOKS AND NEWSPAPER ARTICLES	
Classification in Mental Retardation, 1983 Revision, (Grossman, M.D. Ed.)	7
Webster's Third New International Dictionary of the English Language, Unabridged	4
73% in Texas Poll oppose executing retarded inmates, Austin American Statesman, November 15, 1988 at B-3	6

REPLY BRIEF OF PETITIONER

Respondent's Brief starts off with a rather extensive recitation of the facts of the case of which about half is devoted to facts that have little to do with the issues involved but only serve to emphasize that Penry committed a brutal crime. The issue in this case is not the brutality of the crime, but whether because of Penry's retardation and child abuse, he deserves less than the maximum punishment and whether or not the three Texas Special Issues adequately allow the jury to consider these mitigating factors in answering the life or death questions.

THE THREE SPECIAL ISSUES ARE INADEQUATE FOR THE JURY TO FULLY CONSIDER PENRY'S MITIGATING EVIDENCE

The State argues that Penry was able to introduce all the mitigating evidence he wished. Brief of Respondent at 18. This is true but given the present state of the law in Texas how much mitigating evidence that cuts both ways will he want to introduce? Penry did introduce ample evidence of his mental retardation and abused childhood. Opinions of the Texas Court of Criminal Appeals have consistently held that the only instructions the jury will receive on the Special Issues is that the issues will be answered in accordance with the evidence presented in both phases of the trial. Brief of Petitioner at 24-31. This clearly has a chilling effect on introduction of evidence that cuts both ways because the State can, does and did argue, with approval of the Texas Court of Criminal Appeals, that only the evidence relevant to the issues themselves can be considered. Brief of Petitioner at 24.

The State argues only the States are authorized to determine what factors may be considered by the jury in reaching the life or death decision. Brief of Respondent at

19. The *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) line of cases has consistently rejected this argument holding that the sentencer must at least be able to consider any evidence offered in mitigation of punishment.

The State argues that "mercy" has no place in the constitutional scheme of capital cases (Brief of Respondent at 30.) and to allow it to have a place will be a return to the situation that existed prior to the decision in *Furman v. Georgia*, 408 U.S. 238 (1972). This argument is entirely without merit. In the first place, it assumes that in *Furman* five Justices clearly stated what was wrong with the statutes in existence at that time. All that five justices of this Court could agree on was that, "... carrying out the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *id.* at 239-240. The four dissenting justices agreed that judicial restraint should have been exercised but otherwise there was a wide variety of opinions. *supra*.

In *Woodson v. North Carolina*, the plurality held that, "A process that accords no significance to relevant factors of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." 428 U.S. 280, 304 (1976). In *Lockett v. Ohio*, Chief Justice Burger writing for the plurality stated, "... the Eighth and Fourteenth Amendment requires that the sentencer... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character... that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) In *Eddings v.*

Oklahoma, Justice Powell writing for the plurality stated, "... a consistency produced by ignoring individual differences is a false consistence." 455 U.S. 104, 112 (1982). In *Skipper v. South Carolina* Justice White writing for the Court held the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. 476 U.S. 1, (1986). In *Hitchcock v. Dugger*, Justice Scalia writing for the Court concluded the sentencer must not refuse to consider any non statutory mitigating evidence. ___ U.S. ___, 107 S.Ct. 1821, 1824 (1987)

The State argues that a jury instruction that the jury should answer one of the statutory questions "no" if they believed Penry should not get the death penalty would require that *Jurek* be overruled. Brief of Respondent, at 37. This assumes that this Court in *Jurek v. Texas*, gave its unqualified approval to the Texas Capital punishment scheme. This Court made it clear that its approval was based on the Court of Criminal Appeals assurance that definitions of the terms in the Special Issues would be forthcoming and that these definitions would allow all mitigating evidence to be considered. 428 U.S. 262, 272-3 (1976) Similarly, when this Court gave its approval to the Florida capital punishment statute in *Proffitt v. Florida*, 428 U.S. 242, 253 (1976), it found that on its face the eight statutory aggravating factors versus the seven statutory mitigating factors were adequate to satisfy *Furman*. However, this Court did not hesitate to reverse a Florida conviction when it was apparent that this statute failed to provide for consideration of non-statutory mitigating factors. *Hitchcock v. Dugger* ___ U.S. ___, 107 S.Ct. 1821 (1987)

The *Woodson—Lockett—Eddings—Hitchcock* line of cases hold that for a sentencer to refuse to or be prevented

from considering all mitigating evidence before assessing the penalty of death is cruel and unusual punishment. The State seems to think that the fact that just one hold out juror answering one question "no" can result in a life sentence somehow cures all defects in the Special Issues. However, the jury is charged that "it may not answer any issue 'no' unless 10 more more jurors agree." Art. 37.071 (d)(2) Texas Code Criminal Procedure. They are never told the effect of one juror holding out on one issue.

The State argues that, "The jury was free to consider whether Penry's mental retardation rendered him incapable if acting deliberately." (Brief of Respondent at 23) that, "Evidence of abused childhood also was relevant to whether his conduct was deliberate." (*id.* at 24) and, ". . . any conceivable mitigating evidence is relevant to at least one of the special issues, . . ." *id.* at 31. In the statement taken by Ranger Cook and introduced into evidence, Penry admitted that prior to the rape, he knew that he would have to kill her or she would tell the police (XV R. 2024 1. 1-5), that during the rape he decided to kill her using the scissors she had stabbed him with (XV R. 2027 1. 23-2028 1. 1) and that prior to stabbing the victim he told her he hated to kill her but if he did not kill her she would squeal on him. XV R. 2028 1. 5-7. Webster's Third New International Dictionary of the English Language, Unabridged defines deliberate as, "(1) characterized by or resulting from unhurried, careful, thorough and cool calculation and consideration of effect and consequences, (2) characterized by presumed or real awareness of the implications or consequences of one's actions or sayings or by fully conscious often willful intent, (3) slow, unhurried and steady as though allowing time for decision on each individual action involved." Given the fact that the statement taken by Ranger Cook was read to the jury and

entered into evidence (XV R. 2021 1. 16-25) there is little chance of convincing the jury that Penry did not have the mental capacity to act deliberately. What was the jury to do if they believed beyond a reasonable doubt that Penry was capable of acting deliberately but also believed he should not be executed? Had the assurance the Court of Criminal Appeals gave in *Jurek* been fulfilled and "deliberate" defined so that the jury was informed that for purposes of the First Special Issue a person acts deliberately only if that person's ability to conform his acts to society's requirements have not been significantly reduced due to mental defect or societal factors beyond the person's control, then the First Special Issue could have allowed consideration of Penry's mitigating evidence. Penry was not free in jury argument to argue any definition of deliberate he wished as the State argues. Brief of Respondent at 36. The District Attorney would have, under state law, been able to object that the definition argued was a misstatement of the law since the Court of Criminal Appeals has repeatedly held "deliberate" has its common meaning until such time as the Texas legislature gives it a special meaning. *Lane v. State* 743 S.W.2d 617, 628 n.7 (Tex.Cr.App. 1987).

The State concludes its argument in support of the three Special Issues by making the statement that to charge the jury that they are to vote "no" on one of the Special Issues if they believed Penry should not receive the death penalty would require *Jurek* to be overruled. This assumes that *Jurek* was actually found constitutional on its face. *Jurek* was found constitutional because of the assurance given by the Texas Court of Criminal Appeals that terms in the Special Issues would be defined so as to accommodate all mitigating evidence. 428 U.S. at 272. This Court made it clear than the constitutionality of the

Texas death penalty statute, “. . . turns on whether the enumerated questions allow consideration of particularized mitigating factors.” *id.* Thus this Court only found the Texas death penalty statute was constitutional as the Texas Court of Criminal Appeals indicated it was intending to apply it.

The three Special Issues, without proper jury instructions, are inadequate to accommodate jury consideration of Penry's mitigating evidence. Penry was harmed by the failure of the trial court to give the requested jury instructions.

THE MENTALLY RETARDED SHOULD NOT BE EXECUTED

The State argues that because there is only one state that presently forbids the execution of the retarded (Brief of Respondent at 40) and there are methodological flaws in the two polls cited in Petitioner's Brief (Brief of Respondent at 41) there is no national consensus that a mentally retarded person should not be executed. The State appears to be arguing that hypothetically the facts can be made bad enough that a majority of those polled would support the execution of the retarded and that unless the question asked included a brutal fact situation the poll is flawed.

The State does not point out any state legislatures where the issue of executing the retarded was put to a vote and failed to pass. Such a Bill has now been introduced in Texas by State Representative Bob Melton. 73% *in Texas Poll oppose executing retarded inmates*, Austin American Statesman, November 15, 1988 at B-3. This same article gives the results of a public opinion poll done by the Public Policy Resources Laboratory of Texas A&M University for Harte-Hanks Communications, Inc. When

asked, “Do you think that Texas should have capital punishment?” 86% answered yes. When asked “Should capital punishment be used in cases where the guilty person is mentally retarded?” 73% answered no. The poll had a 5% margin of error. Both questions were asked with no facts given as to the details of the crime and the question on execution of the mentally retarded followed the question on having capital punishment. The results of the poll were very similar to the results obtained in Georgia and Florida polls. J.A. 279, 283.

The State argues that to find that execution of the mentally retarded is cruel and unusual punishment would be to relegate the administration of justice to mental health professionals. Brief of Respondent at 44-49. In making their argument the State tries to equate mental retardation with insanity. The two are not the same. There are reasonably precise tests that measure the degree of retardation and in addition mental retardation will be apparent from an early age or else can be traced to an accident that damaged the brain. See *Classification in Mental Retardation, 1983 Revision*, (Grossman, M.D., Ed.) at 59-77.

Now that the issue of execution of the mentally retarded has been brought to the attention of the public it is becoming clear that the national consensus is that the mentally retarded should not be executed.

Respectfully submitted,
CURTIS C. MASON
Attorney for Petitioner
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 295-6371 Ext. 1370